DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(8)

No. 86-594-CFX
Status: GRANTED

Docketed:
October 10, 1986

Title: National Labor Relations Board and Rosemary M. Collyer, General Counsel, National Labor Relations Board, Petitioners
v.
United Food and Commercial Workers Union, Local 23, AFL-CIO

Court: United States Court of Appeals for the Third Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Ford, Peter J., Murphy, George, Gold, Laurence

Entry	Date	Note	Proceedings and Orders
1	Aug 22 1986		Application for extension of time to file petition and order granting same until October 11, 1986 (Brennan, August 22, 1986).
2	Oct 10 1986	G	Petition for writ of certiorari filed.
4	Nov 10 1986		Order extending time to file response to petition until December 5, 1986.
7	Dec 5 1986		Brief of respondent United Food and Commercial Workers in opposition filed.
8	Dec 10 1986		DISTRIBUTED. January 9, 1987
9	Dec 31 1986	X	Reply brief of petitioners NLRB, et al. filed.
10	Jan 12 1987		Petition GRANTED.
			**********
11	Feb 5 1987		Record filed.
12	Feb 5 1987		Certified copy of NLRB's record filed.
13	Feb 12 1987		Record filed.
14	Feb 12 1987		Certified copy of appendix, briefs and partial proceedings received.
16	Feb 25 1987		Order extending time to file brief of petitioner on the merits until April 2, 1987.
18	Apr 1 1987		Order extending time to file brief of petitioner on the merits until April 11, 1987.
19	Mar 2 1987		Brief amicus curiae of Chamber of Commerce of the U.S filed.
20	Apr 11 1987	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
21	Apr 11 1987		Brief of petitioners NLRB, et al. filed.
22	Apr 20 1987		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
24	May 4 1987		Order extending time to file brief of respondent on the merits until June 12, 1987.
25	Jun 26 1987		Brief of respondent United Food and Commercial Workers filed.
26	Jul 2 1987		CIRCULATED.
27	Jul 20 1987		SET FOR ARGUMENT. Monday, October 5, 1987. (1st case).
28	Sep 25 1987		Reply brief of petitioners NLRB, et al. filed.
29	Oct 5 1987		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86-594

No.

In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD AND ROSEMARY M. COLLYER, GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 23, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board
Washington, D.C. 20570

60 pp

QUESTIONS PRESENTED

1. Whether the withdrawal of an unfair labor practice complaint by the General Counsel of the National Labor Relations Board pursuant to an informal settlement agreement entered into prior to the commencement of a hearing on the complaint constitutes agency action subject to judicial review.

2. Whether, assuming the General Counsel's action is subject to judicial review, the General Counsel must hold an evidentiary hearing whenever the party who filed the unfair labor practice charge objects to the settlement and requests such a hearing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued:

Statutes and regulations:

Statutes, rules and regulations – Continued:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1986

No.

NATIONAL LABOR RELATIONS BOARD AND ROSEMARY M. COLLYER, GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 23, AFL-CIO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board and its General Counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-13a) is reported at 788 F.2d 178. The decisions of the regional director of the National Labor Relations Board and the General Counsel of the National Labor Relations Board rejecting respondent's objections to the withdrawal of the complaints (App., *infra,* 14a-18a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra,* 19a) was entered on May 15, 1986. A petition for rehearing was denied on June 13, 1986 (App., *infra,* 20a-21a). On August 22, 1986, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including October 11, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. II) 151 *et seq.*, the Administrative Procedure Act, 5 U.S.C. (& Supp. II) 551 *et seq.*, and the Board's Rules and Regulations and Statements of Procedure, 29 C.F.R. 101.1 *et seq.*, are set forth at pages 22a-30a of the appendix to this petition.

STATEMENT

1. The National Labor Relations Act provides that "[i]t shall be an unfair labor practice" for an employer or labor organization to engage in conduct that infringes in specified ways upon the rights guaranteed employees under the Act (see 29 U.S.C. 158). The Act confers upon the National Labor Relations Board (NLRB) the authority "to prevent any person from engaging in any unfair labor practice * * * affecting commerce" (29 U.S.C. 160(a)). It states that the Board's General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of [unfair labor practice] charges and issuance of complaints * * *, and in respect of the prosecution of such complaints before the Board" (29 U.S.C. 153(d)), and sets forth in general terms the procedures to be followed by the Board in determining whether an employer or labor organization has engaged in an unfair labor practice (29 U.S.C. 160(b) and (c)). The Board has promulgated detailed regulations containing the procedural rules applicable to the adjudication of an unfair labor practice charge (29 C.F.R. 102.9-102.59).[1]

An unfair labor practice case is initiated by the filing of a charge with the regional director of the NLRB for the region in which the alleged unfair labor practice occurred.

[1] The NLRB also has adopted a statement of procedure describing the process that it follows in adjudicating unfair labor practice cases (29 C.F.R. 101.2-101.16).

The charge must be submitted in writing and under oath, identify the charging party and the person against whom the charge is made, and contain a statement of the facts relating to the alleged unfair labor practice. The regional director then conducts an investigation of the charge, obtaining evidence from both the charging party and the person against whom the charge is filed. If the investigation indicates that the charge lacks merit, the charge may be withdrawn by the charging party or dismissed by the regional director. 29 C.F.R. 101.2, 101.4-101.6, 102.9-102.12.[2]

When the regional director concludes that the charge may have merit, he normally affords an opportunity for the negotiation of an informal settlement agreement. A settlement at this stage of the proceedings does not require the entry of a Board order or court decree. It consists of a commitment by the party named in the charge to take the agreed upon remedial action; the case is closed upon compliance with the terms of the settlement. See 29 C.F.R. 101.7.[3] The concurrence of the charging party is not a prerequisite for an informal settlement, but the charging party generally is consulted in connection with the proposed settlement and may obtain review of the regional director's approval of the settlement by appealing to the General Counsel. 29 C.F.R. 101.7, 102.19.

In the event that a settlement cannot be reached in a case that the regional director has found to be meritorious, the regional director issues a complaint. The charged party must file an answer and is entitled to a hearing before an

[2] The charging party may obtain review by the General Counsel of the regional director's decision to dismiss a charge. 29 C.F.R. 101.6, 102.19.

[3] In the event the charged party fails to comply with an informal settlement agreement, the General Counsel, through the regional director, may set aside the agreement and institute formal complaint proceedings. 29 C.F.R. 101.9(e)(2).

administrative law judge (ALJ). The ALJ's recommended decision is subject to review by the Board; the Board's determination is in turn subject to judicial review. 29 U.S.C. 160(b)-(f); 29 C.F.R. 101.10-101.15, 102.20-102.50.

Although the charged party is entitled to the protections of a hearing and review by the Board prior to a final decision on the merits, the issuance of the complaint is not a bar to settlement. The Board's regulations provide that a complaint "may be withdrawn before the hearing by the regional director on his own motion" (29 C.F.R. 102.18). Thus, prior to the commencement of the hearing before the ALJ, the regional director retains his authority to enter into an informal settlement. Rather than agreeing not to issue a complaint, the regional director agrees to withdraw the complaint in exchange for the charged party's promise to provide the agreed upon relief. A charging party that objects to the terms of such an informal settlement may present its objections to the regional director and may appeal to the General Counsel in the event the regional director rejects the objections and accepts the settlement. 29 C.F.R. 101.7, 101.9(b)(2) and (c), 102.19.[4]

Alternatively, the charged party and the regional director may enter into a formal settlement. A formal settlement consists of the entry of a remedial order by the Board and, ordinarily, the charged party's consent to entry of an enforcement order by the appropriate court of appeals. A settlement of this type is subject to review and approval by the Board; a charging party that objects to the terms of a formal settlement may present its objections to the Board. 29 C.F.R. 101.9(b)(1), 101.9(c)(2).

2. In August 1984, respondent filed with the Board's

[4] After the commencement of the hearing, a regional director's request for withdrawal of the complaint must be approved by the administrative law judge. A party aggrieved by the ALJ's decision may appeal to the Board. 29 C.F.R. 101.9(d).

Pittsburgh Regional Office various unfair labor practice charges against Charley Brothers, Inc., the owner and operator of a grocery store in Mars, Pennsylvania, and the United Steelworkers of America and Local 14744 of that union. Respondent alleged that Charley Brothers had entered into a collective bargaining agreement with the United Steelworkers at a time when the union did not represent an uncoerced majority of Charley Brothers' employees. It also asserted that Charley Brothers had contributed both financial support and other forms of assistance to the union. App., *infra,* 2a-3a; A.R. 1-3.[5]

The regional director investigated the charges and issued complaints against both Charley Brothers and the United Steelworkers. The complaint against Charley Brothers alleged that the company had engaged in a variety of unlawful conduct that interfered with respondent's efforts to organize its employees and had assisted the United Steelworkers' organizational efforts, all of which culminated in Charley Brothers' recognition of the United Steelworkers as the exclusive representative of its employees. App., *infra,* 3a-4a; A.R. 8-15. The complaint against the United Steelworkers alleged that the union had unlawfully accepted assistance and recognition from Charley Brothers, bargained for and executed the collective bargaining agreement at a time when it did not enjoy majority support among the employees, and unlawfully accepted dues deducted from employees' wages under that agreement. App., *infra,* 4a; A.R. 16-22. The regional director sought orders requiring Charley Brothers to withdraw recognition of the United Steelworkers until the union was certified by the NLRB as the representative of the store's employees. App., *infra,* 4a-5a; A.R. 13, 21.

On September 24, 1984, Vic's Markets, Inc., acquired from Charley Brothers the Mars, Pennsylvania, grocery store that was the subject of the complaints. Respondent

[5] "A.R." refers to the administrative record filed in the court of appeals. We have consecutively numbered the pages of the record and our citations refer to those page numbers.

filed charges against Vic's Markets similar to those it had filed against Charley Brothers, and the regional director issued complaints against Vic's Markets and the United Steelworkers incorporating the charges in the prior complaints. The four complaints were consolidated and a hearing before an administrative law judge was scheduled for December 4, 1984. App., *infra,* 5a-6a; A.R. 4-7, 38-47, 60-61.

The regional director, Charley Brothers, Vic's Markets, and the United Steelworkers reached an informal settlement prior to commencement of the hearing on the complaints. Under the proposed settlement agreements, Charley Brothers and Vic's Markets agreed that they would not assist the United Steelworkers' organizing efforts or interrogate employees concerning their union sympathies; would not recognize the United Steelworkers or give effect to the Steelworkers' contract unless that union was selected by a majority of the employees in an election conducted by the Board, and would not in any other manner restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act, 29 U.S.C. 157. The employers also agreed to reimburse employees for the dues deducted from employees' wages pursuant to the contractual checkoff provisions and to post for sixty days a notice reciting the terms of the settlement. A.R. 74-86.

The United Steelworkers agreed that it would not accept any assistance from the employers, give effect to the existing collective bargaining agreement, act as the bargaining representative of the companies' employees or enter into future collective bargaining agreements unless it was selected in an election conducted by the Board, or restrain or coerce employees in any other manner in the exercise of their rights under Section 7 of the Act. The union further agreed to mail to employees a notice that set forth the terms of the settlement agreement. A.R. 74-77. In exchange for these commitments, the regional director

agreed to withdraw the unfair labor practice complaints. The agreements expressly provided that the employers and the Steelworkers did not admit that they had violated the Act (*id.* at 74, 78, 82).

On November 28, 1984, the Regional Director mailed the proposed informal settlement agreements to respondent and asked respondent to join in the agreements "inasmuch as it is my opinion that the proposed Settlement Agreements fully remedy any violative conduct alleged in your charges" (A.R. 73). The regional director advised respondent of its right to file objections to the proposed settlements (*ibid.*).

Respondent objected to the proposed settlements on six separate grounds. It asserted that it had not been "afforded full opportunity to dispose of the cases by amicable adjustment"; that the sixty-day period for posting the notice was "of insufficient duration to dissipate the effect of the unfair labor practices and * * * permit a free representation election"; that because the settlement agreements did not bar employees from engaging in union activity on behalf of the United Steelworkers during the sixty-day notice period, respondent should have been provided with "countervailing special access remedies" to enable respondent to conduct organizational activities at the store; that the agreements were deficient because they did not provide for formal Board orders and consent decrees; that the charged parties should have been required to admit that they had violated the Act; and that the notices to be posted to provide information to employees were ambiguous (App., *infra,* 6a-7a).

On December 12, 1984, the Regional Director advised respondent that he had approved the settlement agreements and withdrawn the complaints. The regional director modified the notice directed to employees in response to respondent's claim that the notice was ambiguous; he concluded that respondent's objections to the settlements

were otherwise "without merit." App., *infra,* 16a-18a. The regional director found that respondent "had ample opportunity to reach a non-Board adjustment if it so desired" and that formal settlements were not appropriate under the circumstances of the case (*id.* at 17a). With respect to respondent's claim that the sixty-day period for posting of the notice was too short, the regional director observed that sixty days "is the period of time historically used * * * to correct unlawful conduct like that alleged in the Complaints and is the posting period the Board normally would order upon a finding of a violation" (*ibid.*).

The regional director rejected respondent's assertion that the settlement agreements would give the United Steelworkers an advantage in gaining the right to represent the employees, noting that the employers were barred "from granting assistance or support [to a union] and from denying [respondent] access while granting access to the Steelworkers" (App., *infra,* 17a). He stated that if these restrictions were violated "additional charges may be filed and a determination will be made after all the facts have been gathered" (*ibid.*). Finally, the regional director explained that the provisions of the settlement agreements providing that the charged parties did not admit liability were included pursuant to "agency practice * * * in order to promote settlement" (*id.* at 18a).

Respondent appealed the regional director's determination to the General Counsel; the General Counsel denied the appeal (App., *infra,* 14a-15a). The General Counsel found that the informal settlement agreements adequately remedied the violations charged in the complaint "substantially for the reasons set forth in the Regional Director's letter of December 12, 1984" (*id.* at 14a). She also rejected respondent's assertion that the regional director was required to hold a hearing regarding respondent's objections to the settlement agreements. Noting that the Board's rules and regulations make no provision for a hearing on objections to a settlement and that "the evidence indicates that [the Board's] procedures were properly followed," the General Counsel concluded that "insufficient basis exists to invalidate the settlement agreement on those grounds" (*id.* at 14a-15a).

3. Respondent filed a petition for review in the court of appeals seeking to invalidate the settlement agreements. The Board and the General Counsel argued that the petition should be dismissed because the General Counsel's decision to withdraw the complaints and approve the settlements was not a "final order of the Board" within the meaning of Section 10(f) of the Act, 29 U.S.C. 160(f), and therefore was not subject to judicial review. The court of appeals followed its earlier decision in *Leeds & Northrup Co.* v. *NLRB,* 357 F.2d 527 (3d Cir. 1966), holding that it had jurisdiction to review the General Counsel's action and that the General Counsel erred by denying respondent's request for an evidentiary hearing concerning its objections to the settlement agreements (App., *infra,* 1a-13a).

The court of appeals in *Leeds & Northrup* held that the General Counsel's withdrawal of a complaint pursuant to an informal settlement was subject to judicial review under Section 10(f) and the judicial review provisions of the Administrative Procedure Act (357 F.2d at 531). The court observed that the Board's decision to approve a formal settlement agreement is subject to judicial review and stated that "[t]he absence of a formal order of the Board" does not preclude review of the General Counsel's decision to withdraw a complaint (*ibid.*). Noting that "[a]bsent judicial review, substantial rights of both the Company and its employees * * * are adversely affected," the court stated that "[t]o propose that United States Courts of Appeal are powerless, in a jurisdictional sense, to review quasi-judicial administrative action, either because rules and regulations, or policy, do not provide an adequate

avenue of review up to the door of the court, or because of the absence of precise Congressional articulation for such review, poses inadequacy and injustice which Congress would never intend" (*id.* at 531-532). The court therefore found that "once a complaint issues the statutory scheme contemplates Board action. Anything less, such as informal actions of its agents in dismissing such complaint over the objections of the charging party is arbitrary and capricious" (*id.* at 533).

After finding jurisdiction to review the General Counsel's action, the *Leeds & Northrup* court held that "once a complaint has issued, the charging party is entitled to an evidentiary hearing upon its objections to the proposed settlement agreement, be it formal or informal" (357 F.2d at 533). The court stated that the issuance of the complaint triggers "an adjudicatory phase of the administrative process * * * necessitating appropriate avenues of review, both administrative and judicial" (*id.* at 535); it concluded that an evidentiary hearing was an indispensible element of the required administrative review (*id.* at 535-536).

The court of appeals in the present case concluded that it could "discern no principled distinction between *Leeds* and the instant case" (App., *infra,* 11a). The court noted that respondent's objections to the settlement agreements raised no "material disputes of fact," but rather "involve[d] merely procedural matters or discretionary determinations concerning the remedy" and that "a *Leeds* evidentiary hearing might therefore result in mere adherence to an empty formality" (*ibid.*). The court stated (*id.* at 12a) that it was required to follow its prior decision with respect to both the jurisdictional issue and the need for an evidentiary hearing but noted the existence of "ostensible precedents to the contrary" including this Court's decision in *Cuyahoga Valley Railway Co.* v. *United Transportation Union,* No. 84-1634 (Nov. 4, 1985)

(per curiam). The court of appeals vacated the settlement agreements and remanded the case for an evidentiary hearing concerning respondent's objections.

REASONS FOR GRANTING THE PETITION

This case presents two important questions concerning the procedural requirements applicable to the settlement of an unfair labor practice charge by the General Counsel of the National Labor Relations Board. The conclusion of the court below that the General Counsel's decision to withdraw a complaint, prior to the commencement of a hearing, is subject to judicial review squarely conflicts with the recent decision of another court of appeals and cannot be reconciled with the plain language of the National Labor Relations Act, which endows the General Counsel with "final authority" over the prosecution of such complaints (29 U.S.C. 153(d)).

The court below compounded this initial error by concluding that a charging party that is dissatisfied with the settlement of an unfair labor practice charge must always be afforded an evidentiary hearing regarding its objections to the settlement, even if the objections do not in any way rest upon a dispute over the relevant facts. This determination squarely conflicts with the views of other courts of appeals that have addressed this question, is completely without statutory support, and defies common sense. The court of appeals itself acknowledged that its procedural rule "might result in mere adherence to an empty formality" (App., *infra,* 11a).

These questions touch upon matters of substantial importance in the administration of the National Labor Relations Act. The overwhelming majority of unfair labor practice charges are expeditiously resolved pursuant to settlement agreements; the burdensome procedural requirements imposed by the court of appeals threaten to impede the effectiveness of this important enforcement tool. Review by this Court is therefore plainly warranted.

1. a. There is a square conflict between courts of appeals concerning the reviewability of the General Counsel's decision to withdraw a complaint prior to hearing in connection with an informal settlement. The Third Circuit, in the present case and in *Leeds & Northrup Co.* v. *NLRB,* 357 F.2d 527 (3d Cir. 1966), and the District of Columbia Circuit, in *International Ladies' Garment Workers Union* v. *NLRB*, 501 F.2d 823, 828-831 (D.C. Cir. 1974), have concluded that judicial review of the General Counsel's decision is authorized by the National Labor Relations Act. The Sixth Circuit held in *Jackman* v. *NLRB,* 784 F.2d 759 (1986), that it was "without jurisdiction to review the General Counsel's decision to withdraw the unfair labor practice complaint" (784 F.2d at 764 (footnote omitted)).[6]

Indeed, the courts of appeals themselves have acknowledged the existence of this conflict. Thus, the Sixth Circuit observed in *Jackman* that the Third and District of Columbia Circuits had reached a "conflicting conclusion[]," and stated that those courts had "misconstrue[d] the purposes and policies of the [National Labor Relations] Act" (784 F.2d at 764 n.13). The court below noted the differing view of the Sixth Circuit and stated that "[d]espite the conflict among the Circuits which today's affirmance of *Leeds*

[6] Some courts have found that the General Counsel's decision to withdraw a complaint is not subject to judicial review where the reason for the withdrawal is the General Counsel's determination that the case could not be successfully prosecuted. These courts have suggested, however, that a decision to withdraw a complaint on those grounds is different from a settlement because a settlement "involves the restructuring of the charging party's 'private rights.' " *International Association of Machinists v. Lubbers*, 681 F.2d 598, 604 (9th Cir. 1982), cert. denied, 459 U.S. 1201 (1983); *George Banta Co.*, v. *NLRB*, 626 F.2d 354, 356-357 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981). Although these decisions do not squarely address the question presented here, they provide additional evidence of the confusion among the courts of appeals regarding the reviewability of the General Counsel's decision to withdraw a complaint.

perpetuates, we are nevertheless constrained to adhere to *Leeds*" (App., *infra*, 12a n.8).

b. Moreover, the court of appeals' decision is plainly incorrect. The language and legislative history of the National Labor Relations Act make clear that the General Counsel's decision to withdraw an unfair labor practice complaint is not subject to judicial review.

The National Labor Relations Act itself provides for judicial review only of "a final order of the Board" (29 U.S.C. 160(f)). The General Counsel's withdrawal of a complaint obviously is not an order of the Board; the General Counsel's decision involves no action by the Board at all. See *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 409 (1940). Section 3(d) of the National Labor Relations Act, 29 U.S.C. 153(d), endows the General Counsel with "final authority, on behalf of the Board" regarding both "the issuance of complaints" and "the prosecution of such complaints before the Board." As Judge Friendly observed, "the General Counsel's authority 'in respect of the prosecution of such complaints before the Board' must include the power to determine whether a complaint can be successfully prosecuted and, if he thinks not, to drop it; by the same token he has power to consider and decide whether the public interest would be better served by settlement" (*Local 282, International Brotherhood of Teamsters* v. *NLRB*, 339 F.2d 795, 799 (2d Cir. 1964)). Section 3(d) therefore makes clear that the General Counsel's withdrawal of a complaint is an action independent of the Board.

The legislative history of Section 3(d) strongly supports this conclusion. Section 3(d) was enacted in response to the criticism directed against the NLRB because, under the original statute, the Board was responsible for both the prosecution and adjudication of unfair labor practice charges; Representative Hartley noted that "[t]he National Labor Relations Board has been investigator, prosecutor,

jury and judge all rolled into one" (93 Cong. Rec. 3423-3424 (1947)). Congress decided to separate these functions, establishing a General Counsel with "the final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair practices, and in respect of the prosecution of such complaints before the Board" (H.R. Conf. Rep. 510, 80th Cong., 1st Sess. 37 (1947)). In view of this strict separation of responsibilities, the General Counsel's decision cannot be characterized as an order issued by the Board.

Indeed, this Court's recent decision in *Cuyahoga Valley Railway Co* v. *United Transportation Union*, No. 84-163 (Nov. 4, 1985) (per curiam), provides further support for this result. That case concerned the enforcement scheme established by the Occupational Safety and Health Act. The Secretary of Labor is authorized to issue citations to employers that he finds to be in violation of the Act; an employer may contest the validity of a citation before the Occupational Safety and Health Review Commission. The question presented in *Cuyahoga Valley Railway Co.* was whether the Commission could review the Secretary's decision to withdraw a citation. This Court found that "[a] necessary adjunct of [the Secretary's power to establish substantive standards and issue citations] is the authority to withdraw a citation and enter into settlement discussions" (slip op. 4). Observing that "the Commission itself was created to avoid giving the Secretary both prosecutorial and adjudicatory powers," the Court noted that permitting the Commission to review the Secretary's decision "would * * * allow the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend" (*id.* at 4-5). In view of the essentially identical division of authority between the General Counsel and the Board, the General Counsel's decision to withdraw a complaint cannot be considered to be an order of the Board and, therefore, that decision is not subject to judicial review under the National Labor Relations Act.[7]

The Third Circuit in *Leeds & Northrup* also rested its conclusion that the General Counsel's withdrawal of a complaint is subject to judicial review upon the provision of the Administrative Procedure Act providing for judicial review of agency action (see 357 F.2d at 531, 532). It is clear, however, that the APA does not authorize judicial review of the General Counsel's determination.[8]

---

[7] The District of Columbia Circuit concluded that the fact that Section 3(d) provides that the General Counsel exercises her authority "on behalf of the Board" suggests that the General Counsel's decisions are equivalent to orders issued by the Board (*International Ladies' Garment Workers Union* v. *NLRB*, 501 F.2d at 829-831). However, the reference to the Board in Section 3(d) reflects Congress's intent that the General Counsel would function as a part of the same agency as the Board, exercise her authority "in the name of * * * the Board," and follow applicable Board precedents. It does not in any way indicate that the General Counsel's decisions should be considered equivalent to orders issued by the Board. See H.R. Conf. Rep. 510, 80th Cong., 1st Sess. 37 (1947); 93 Cong. Rec. 6383 (1947) (remarks of Rep. Hartley). Indeed, if the court's view of the statute were accepted, all decisions of the General Counsel presumably would constitute Board actions subject to judicial review; as we discuss below (at 17), however, it is clear that the General Counsel's decision not to issue a complaint is not subject to judicial review.

[8] As a threshold matter, the APA could not provide a basis for direct review by a court of appeals of the General Counsel's action. The APA creates a cause of action and is not a grant of jurisdiction. See 5 U.S.C. 703; *Califano* v. *Sanders*, 430 U.S. 99, 104-107 (1977). In the absence of a statute establishing jurisdiction to seek direct review in a court of appeals, the cause of action created by the APA may only be asserted in the appropriate district court pursuant to the general grant of jurisdiction over cases raising a federal question (see 28 U.S.C. 1331). The APA issue is properly presented in this case even though respondent commenced this action in the court of appeals, however, because this Court could order the action transferred to the appropriate district court pursuant to 28 U.S.C. 1631 if it concludes that the APA does authorize judicial review.

The APA specifies that judicial review of agency action is not available when "agency action is committed to agency discretion by law" (5 U.S.C. 701(a)(2)). This Court stated in *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985), that the inquiry under this provision is whether "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion" (slip op. 9). It found in that case that "an agency's decision not to take enforcement action" is presumptively immune from judicial review; the presumption may be rebutted "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers" (slip op. 11 (footnote omitted)).

A decision to exercise prosecutorial discretion by withdrawing a complaint and entering into an informal settlement implicates the precise considerations that led this Court to conclude in *Chaney* that a decision not to take enforcement action is not subject to judicial review. Indeed, there is no basis for drawing a distinction between accepting an informal settlement in lieu of issuing a complaint and withdrawing a previously-issued complaint in favor of such a settlement; the latter decision is simply a delayed version of the former. In both situations the decisionmaker must consider "not only * * * whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed * * * , whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all" (*Chaney*, slip op. 10).

The selection of the terms upon which a complaint should be settled turns upon a variety of additional factors such as the strength of the evidence, the seriousness of the offense and the likelihood of its repetition, and the willingness of the charged party to settle.[9] The agency is "far better equipped than the courts" to assess these variables (*Chaney*, slip op. 10), and its decision to enter into such a settlement should therefore be presumptively immune from judicial review.

This presumption plainly applies in the case of the General Counsel's decision to withdraw a complaint. The statute creating the Office of the General Counsel expressly endows the General Counsel with plenary authority over prosecutorial decisions (29 U.S.C. 153(d)). It is well settled that this provision grants the General Counsel "unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); see also *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138, 155 (1975). And nothing in the language of Section 3(d) suggests that the General Counsel's prosecutorial discretion terminates upon the issuance of the complaint. Indeed, the provision expressly confers upon the General Counsel "final authority, on behalf of the Board, * * * in respect of the *prosecution* of such complaints before the Board" (emphasis added), and therefore plainly encompasses a decision whether to dismiss a complaint in favor of an informal settlement (see pages 13-15, *supra*).

Moreover, the very structure of the statute indicates that Congress did not intend to subject the General Counsel's decisions to judicial review. As we have discussed, Congress enacted Section 3(d) in order to separate the Board's prosecutorial authority from its adjudicatory authority. Congress most likely intended that the well-settled rule

---

[9] These determinations are often made before a complaint has issued, but that is not always the case. Circumstances may change or events come to light after a complaint has issued that make it advisable to terminate the proceeding or accept a settlement. Indeed, the charged party may not indicate a willingness to settle until a complaint has issued.

that prosecutorial decisions are not subject to judicial review (see, *e.g.*, *Ball* v. *United States*, No. 84-5004 (Mar. 26, 1985), slip op. 4; *United States* v. *Goodwin*, 457 U.S. 368, 381-382 (1982)) would apply in respect to the General Counsel's exercise of her prosecutorial discretion.

Thus, the National Labor Relations Act expressly subjects final decisions of the Board to judicial review, but in creating the Office of the General Counsel Congress did not enact a similar provision applicable to the General Counsel's decisions. Moreover, even though the Administrative Procedure Act was passed only one year before the creation of the Office of the General Counsel and figured in the debates over some aspects of the General Counsel's role (see, *e.g.*, 93 Cong. Rec. 6455 (1947)), Congress nowhere indicated that it intended to subject the General Counsel's decisions to judicial review under that statute. The legislative history instead confirms that the General Counsel's prosecutorial decisions should not be subject to any form of judicial review.

The principal criticism advanced by opponents of the plan to create an Office of the General Counsel was that too much authority would be concentrated in the General Counsel. Senator Pepper observed that "one man is made the arbiter of every case that comes before the attention of the Board. The Board has no authority to decide whether a case should be brought, or whether a complaint should be acted upon. That exclusive power is given to one lawyer" (93 Cong. Rec. 6513 (1947)). Another Senator specifically referred to the unreviewability of the General Counsel's decisions, stating that "[o]ne person will determine when complaints shall issue in all cases, how investigations shall be conducted, how cases shall be tried, which cases shall be enforced. Much of this action will not be subject to appeal, either to the Board or the courts" (*id.* at 6496 (remarks of Sen. Murray)).

Senator Taft, one of the principal sponsors of the legislation, rebutted this criticism by observing that the

decisions that would be entrusted to the General Counsel were not at that time subject to review by the Board, and instead were reviewed by "an anonymous committee of subordinate employees" (93 Cong. Rec. 6859 (1947)). Senator Taft's statement continued (*ibid.*):

> What the conference amendment does is simply to transfer this "vast and unreviewable power" from this anonymous little group to a statutory officer responsible to the President and to the Congress. So far as having unfettered discretion is concerned he, of course, must respect the rules of decision of the Board and of the courts. In this respect his function is like that of the Attorney General of the United States or a State attorney general.

Senator Taft thus did not respond to critics of the legislation by asserting that the General Counsel's decisions would be subject to judicial review; he confirmed the unreviewability of those decisions by analogizing the General Counsel's authority to the authority exercised by the Attorney General. A decision by the Attorney General to dismiss an action in favor of an informal settlement is not subject to judicial review in the absence of a statute specifically providing for such review. Congress plainly intended that the same rule would apply to prosecutorial decisions made by the General Counsel. *Jackman* v. *NLRB*, 784 F.2d at 763-764.[10]

---

[10] The Court stated in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975), that the analogy between an unfair labor practice proceeding and a criminal prosecution was "far from perfect" (421 U.S. at 156 n. 22), but the only limitation upon the General Counsel's prosecutorial discretion cited by the Court was that the General Counsel may issue a complaint only after a private party has filed an unfair labor practice charge. The Court also noted that the Board's rules and regulations accord a charging party the status of "party" to the unfair labor practice proceeding once a complaint issues, but the Board's rules and regulations expressly limit the charging party's participation (see note 13, *infra*) and do not affect the General Counsel's prosecu-

2. Even if the court below had properly asserted jurisdiction to review the settlement agreement, its additional holding that the charging party is always entitled to an evidentiary hearing regarding its objections to a settlement cannot be supported by reference to the National Labor Relations Act or the APA and conflicts with the decisions of other courts of appeals.

a. The courts of appeals have adopted three conflicting approaches to the need for an evidentiary hearing when the charging party objects to an unfair labor practice settlement agreement.[11] Some courts have concluded that the charging party need only be given an opportunity to state its objections and, if its objections are rejected, a statement of reasons why. *Oshkosh Truck Corp.* v. *NLRB*, 530 F.2d 744 (7th Cir. 1976); *Local 282, International Brotherhood of Teamsters* v. *NLRB*, 339 F.2d at 799-801; see also *International Ladies' Garment Workers Union* v. *NLRB*, 501 F.2d at 832 (charging party must be given either an evidentiary hearing or a statement of the reasons for accepting the settlement). Other courts have indicated that an evidentiary hearing must be held if the charging party's objections raise a dispute regarding a material fact. *George Ryan Co.* v. *NLRB*, 609 F.2d 1249, 1252-1253 (7th Cir. 1979); *NLRB* v. *Oil, Chemical and Atomic Workers International Union*, 476 F.2d 1031, 1034-1037 (1st Cir. 1973); *NLRB* v. *International Brotherhood of Electrical Workers, Local Union 357*, 445 F.2d 1015 (9th Cir. 1971); *Concrete Materials of Georgia, Inc.* v. *NLRB*, 440 F.2d 61, 68 (5th Cir. 1971). The court below is alone in concluding that the charging party always must be accorded

torial discretion either to refuse to issue a complaint or to withdraw a complaint as part of an informal settlement prior to the hearing.

[11] Although this question arises in the present case in the context of an informal settlement agreement, the identical question frequently arises in connection with formal settlement agreements subject to review by the Board.

an evidentiary hearing. App., *infra*, 11a; *Leeds & Northrup Co.*, 357 F.2d at 533. The courts of appeals themselves have acknowledged the existence of a conflict regarding the General Counsel's obligation to hold a hearing. See, *e.g.*, App., *infra*, 11a; *International Ladies' Garment Workers Union* v. *NLRB*, 501 F.2d at 831; *Concrete Materials of Georgia, Inc.* v. *NLRB*, 440 F.2d at 67-68.

b. There simply is no statutory support for the hearing requirement imposed by the court of appeals in this case. The National Labor Relations Act grants the charged party a right to a hearing in an unfair labor practice proceeding; the Board "[i]n [its] discretion" may permit any other person, such as a charging party, to intervene and present testimony. 29 U.S.C. 160(b); *Amalgamated Utility Workers* v. *Consolidated Edison Co. of N.Y.*, 309 U.S. 261, 264-265 (1940). The Board's rules permit a charging party to present evidence and cross examine witnesses at the unfair labor practice hearing (29 C.F.R. 102.38). With respect to a settlement, however, a charging party is limited to the submission of a written statement setting forth its objections to the settlement. 29 C.F.R. 101.6, 101.9(c)(1) and (2).[12] Thus, neither the statute nor the Board's regulations grant charging parties a right to an evidentiary hearing.

Nor does the Administrative Procedure Act require a hearing. The provision of that statute relating to settlements provides "all interested parties" with certain procedural rights in connection with settlements (5 U.S.C.

[12] In the case of informal settlements entered into prior to the commencement of the hearing before the ALJ, charging parties may submit written statements to the regional director and obtain review of the regional director's decision by the General Counsel. 29 C.F.R. 101.6, 101.9(c)(1). A charging party may submit objections to proposed formal settlements and, if the formal settlement is entered, it may appeal to the Board. 29 C.F.R 101.9(c)(2). If an informal settlement agreement is reached after the hearing has begun, the charging party may submit a written statement or state on the record its objections to the settlement. 29 C.F.R. 101.9(d)(1) and (2).

554(c)). But the purpose of that provision was to ensure "that informal means of settlement be made available, and not at all to broaden the category of those entitled to demand a hearing—an issue left for determination under the relevant substantive statutes" (*Local 282*, 339 F.2d at 801). Since the National Labor Relations Act does not entitle a charging party to a hearing in connection with the consideration of a complaint on the merits, such a party surely cannot demand a hearing in connection with the settlement of a complaint. *Id.* at 800-801; see also *NLRB* v. *Oil, Chemical & Atomic Workers International Union*, 476 F.2d at 1034-1035; *Concrete Materials of Georgia, Inc.* v. *NLRB*, 440 F.2d at 68 n.9.[13]

The Third Circuit's determination that a charging party is always entitled to an evidentiary hearing on its objections to a settlement agreement thus contravenes this Court's admonition that "[a]bsent constitutional constraints or extremely compelling circumstances, the 'administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties" ' " (*Vermont Yankee Nuclear Corp.* v. *NRDC*, 435 U.S. 519, 543-544 (1978)). Indeed, such a hearing requirement could, as a practical matter, force the General Counsel to litigate many cases in which the charging party opposed the settlement. The delay that would result from the evidentiary hearing—and the cost of participating in the hearing—might well discourage charged parties from entering into settlements. The Board's rules permitting charging parties to file objections to settlements, and requiring the General Counsel or the Board to issue a statement of reasons in the event the settlement agreement is approved, properly accommodate the relevant interests, ensuring that charging parties have an opportunity to present their views while preserving settlements as a useful enforcement tool.[14]

[13] The Board's regulations include a charging party within the definition of "party," but go on to provide that the definition does not "prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only" (29 C.F.R. 102.8). The Board has exercised the latter authority by declining to accord charging parties an automatic right to a hearing regarding a proposed settlement agreement.

3. Amicable settlements are "the life-blood of the administrative process" (Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, *Final Report*, S. Doc. 8, 77th Cong., 1st Sess. 35 (1941)). The National Labor Relations Board "has from the very beginning encouraged compromises and settlements" (*Wallace Corp.* v. *NLRB*, 323 U.S. 248, 253-254 (1944) (footnote omitted)). Informal settlement agreements of the type involved in this case "permit the Board to concentrate its quasi-judicial activities on other matters, thereby enhancing its overall efficient administration" (*Jackman* v. *NLRB*, 784 F.2d at 764). Indeed, the General Counsel currently settles approximately 95% of all meritorious cases.[15] Informal settlements following the issuance of a complaint constitute a significant number of those cases.[16]

[14] *United Automobile Workers* v. *Scofield*, 382 U.S. 205 (1965), is not to the contrary. The Court held in that case that a successful charging party may intervene in a proceeding in a court of appeals seeking review of a Board order. The Court observed that a private party could not institute a contempt proceeding because that situation involved "the Board's expertness in achieving compliance with [its] orders" (382 U.S. at 221). As we have discussed, affording a charging party an evidentiary hearing on its objections to a settlement would also intrude upon the Board's ability to utilize settlements in achieving compliance with the requirements of the Act.

[15] Summary of Operations for Fiscal Year 1985, Office of the General Counsel, National Labor Relations Board 9 (June 23, 1986).

[16] In fiscal year 1983, the most recent year for which statistics are available, the NLRB settled a total of 10,632 cases. Of those, 3,931 were settled after the issuance of a complaint and before the com-

The decision of the court below, if allowed to stand, will adversely affect this settlement process. The General Counsel's ability to secure informal settlements prior to the commencement of a hearing depends substantially on her ability to assure the charged party that it will be able to avoid the costs of a hearing and appeals to the Board and the courts. Permitting judicial review of such informal settlements, and requiring an evidentiary hearing whenever the charging party objects to a settlement, will provide a strong disincentive to settlement negotiations and "obstruct expeditious Board dispositions without concomitant benefit to its decision-making process" (*NLRB* v. *Oil, Chemical and Atomic Workers*, 476 F.2d at 1036). That result is inconsistent with Congress's desire to achieve the prompt and peaceful resolution of industrial labor disputes.

---

mencement of a hearing before an administrative law judge; almost all of those settlements—3,803—were informal settlements identical to the settlement at issue in this case. 48 NLRB Ann. Rep. 183-185 (1983).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ROBERT C. BELL, JR.
Attorney
National Labor Relations Board

OCTOBER 1986

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 85-3116

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 23, AFL-CIO-CLC, PETITIONER

v.

N.L.R.B., ET AL, RESPONDENTS

On Petition for Review of the Final Order from the National Labor Relations Board

---

Argued January 9, 1986

[Filed April 16, 1986]

BEFORE: GARTH, and STAPLETON, *Circuit Judges* and FULLAM, *District Judge**

OPINION OF THE COURT

GARTH, *Circuit Judge:*

In this case, this court is faced with the question of whether a charging party alleging unfair labor practices is entitled to an evidentiary hearing on its objections to proposed informal settlement agreements entered into by representatives of the National Labor Relations Board (Board) and the charged parties after the Board has issued a formal complaint. In *Leeds & Northrup Co. v. NLRB,*

---

*Honorable John P. Fullam, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

357 F.2d 527 (3d Cir. 1966), this court held that "once a complaint has issued, the charging party is entitled to an evidentiary hearing upon its objections to the proposed settlement agreement, be it formal or informal." 357 F.2d at 533. Local 23 has petitioned to review the General Counsel's refusal to entertain its objections to an informal settlement at an evidentiary hearing. We grant the petition and remand for an evidentiary hearing pursuant to *Leeds & Northrup.*

I.

On August 9, 1984, the United Food and Commercial Workers Union, Local 23, AFL-CIO-CLC (Local 23), filed unfair labor practice charges with the Board against Charley Brothers, Co., Inc., (Charley Bros.) owner and operator of Mars Shop 'N Save, a grocery store located in the Cranberry Mall in Mars, Pennsylvania. In its complaint, Local 23 alleged that Charley Bros. had violated §§ 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (3),[1] by executing a collective-bargaining agreement containing union security and dues check-off provisions with the United Steelworkers of America, Local 14744, (Steelworkers) at a time when the Steelworkers did not represent an uncoerced majority of the employees.[2] In a separate charge filed that same day, Local 23 alleged that the Steelworkers violated

[1] Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1), provides:

(a) It shall be an unfair labor practice for an employer–

(1) to interfere with, restrain, or coerce employees in the exercise of the right guaranteed in section 157 of this title;. . .

In relevant part, section 8(a)(3) of the NLRA, 29 U.S.C. § 158(a)(3), provides:

(a) It shall be an unfair labor practice for an employer–

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;. . .

[2] On August 31, 1984 Local 23 amended its complaint against Charley Brothers to add charges that Charley Brothers unlawfully

§§ 8(b)(1)(A) and (2) of the NLRA, 29 U.S.C. §§ 158(b)(1)(A) and (2),[3] by executing the collective-bargaining agreement and accepting recognition by Charley Brothers. On September 14, 1984, Gerald Kobell, the Regional Director of the NLRB, consolidated the two complaints and issued formal unfair labor practice charges against Charley Brothers and the Steelworkers.

Specifically, Charley Brothers was charged with:

(1) interrogating employees concerning their activity on behalf of Local 23;

(2) destroying authorization cards given to employees by Local 23 in the presence of employees;

(3) granting recognition to the Steelworkers as the exclusive collective-bargaining representative of its bargaining unit employees at a time when the Steelworkers did not represent an uncoerced majority of the employees;

(4) participating in the solicitation of employee signatures on Steelworkers' authorization cards;

contributed financial and other support to the Steelworkers in violation of section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2).

Section 8(a)(2) of the NLRA, 29 U.S.C. § 158(a)(2), in relevant part, provides that:

(a) It shall be an unfair labor practice for an employer–

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it; . . .

[3] Section 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A), provides in relevant part:

(b) It shall be unfair labor practice for a labor organization or its agents–

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title; . . .

Section 8(b)(2) of the NLRA, 29 U.S.C. § 158(b)(2), provides in relevant part:

(b) It shall be an unfair labor practice for a labor organization or its agents–

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section . . . .

(5) denying Local 23 access to its facility for organizational purposes while granting access to the Steelworkers for the same purpose;

(6) informing employees that Charley Brothers had selected the steward for the Steelworkers;

(7) informing employees that they could only receive union representation by selecting the Steelworkers;

(8) soliciting employee signatures for a petition in support of the Steelworkers on several occasions; and

(9) withholding and deducting dues for the Steelworkers from all bargaining unit employees' pay regardless of whether the employees had authorized such deductions.

App. 23-25; 49.

The Steelworkers were charged with receiving assistance from Charley Bros. and unlawfully bargaining for and executing a collective-bargaining agreement including a union security and dues check-off provision.

To remedy the unfair labor practices allegedly committed by Charley Brothers, the Regional Director sought an order requiring the company to

> withdraw and withhold recognition from the Steelworkers as the exclusive bargaining representative of the employees employed at its Mars facility, and to cease and desist from giving any force or effect to any collective-bargaining agreement covering those employees . . . unless and until the Steelworkers are certified by the Board as the collective-bargaining representative of the employees at that store.

App. 25-26.

As to the Steelworkers, the Regional Director sought an order requiring the Union

> to cease accepting recognition as the exclusive bargaining representative of employees employed by the Employer at its Mars facility, to cease and desist from giving any force or effect to any collective-bargaining agreement covering those employees . . . . unless and until the [Union] is certified by the Board as the collective-bargaining representative of the employees at that store and to reimburse all present and former employees for any dues, initiation fees and other monies, paid directly to [the Steelworkers] or withheld for [the Steelworkers'] benefit pursuant to the union checkoff authorization provision set forth in the collective-bargaining agreement with appropriate interest.

App. 33.

On September 24, 1984, Vic's Market acquired the Mars Shop 'N Save Store from Charley Brothers with notice of the unfair labor practice charges pending against Charley Brothers. Vic's Markets extended recognition and assistance to the Steelworkers as the exclusive bargaining representative of the Mars Shop 'N Save employees. Accordingly, on October 11, 1984, Local 23 filed charges against Vic's Markets and Steelworkers similar to those previously filed against Charley Brothers and the Steelworkers. On November 14, 1984, the Regional Director issued formal unfair labor practice complaints against Vic's Markets and the Steelworkers.[4]

The complaint against Vic's Markets charged that Vic's, as a "successor employer" to Charley Bros., was liable for any unfair labor practices allegedly committed by its predecessor. Further, the complaint alleged that Vic's Markets unlawfully recognized the Steelworkers, enforced the collective-bargaining agreement, and withheld dues on behalf of the Steelworkers in violation of Sections 8(a)(1), (2) and (3) of the NLRA, 29 U.S.C. §§ 158(a)(1), (2) and

---

[4] On November 14, 1984 the Regional Director also amended the September 14, 1984 consolidated complaints against Charley Brothers and the Steelworkers to allege their fraudulent use of an attendance list as a list of employees ratifying the collective-bargaining agreement between the parties.

(3). App. 50-59. The Steelworkers were charged with unlawfully accepting recognition from Vic's Markets, adopting the collective-bargaining agreement and accepting dues from Mars Shop 'N Save employees.

On November 15, 1984, the Regional Director consolidated the four cases against Charley Brothers, Vic's Markets and the Steelworkers and scheduled an unfair labor practice hearing for December 4, 1984. Prior to that date the Board's regional office and the charged parties entered into settlement negotiations, allegedly without notice to Local 23. On November 22, 1984, the scheduled hearing was indefinitely postponed, and, by letter dated November 28, 1984, the Regional Director informed Local 23 of proposed informal settlement agreements in the consolidated cases. In that letter, the Regional Director indicated his intention to approve the agreements "inasmuch as . . . [they] fully remedy any violative conduct alleged in [Local 23's] charges." App. 85.

On December 6, 1984, Local 23 submitted to the Regional Director six objections to the proposed informal settlement. Specifically, Local 23 argued that:

> (1) The proposed settlement agreements were entered into without the Charging Party being afforded full opportunity to dispose of the cases by amicable adjustment, as required by the Board's rules. Therefore, the agreements are invalid;
>
> (2) The proposed settlement agreements inadequately remedy the unfair labor practices alleged in the consolidated complaints because the sixty (60) day notice posting periods provided therein are of insufficient duration to dissipate the effect of the unfair labor practices and to permit a free representation election. It is necessary to hold an administrative hearing to fully remedy the alleged violations of law;

> (3) Since they do not specifically prohibit employees of the Respondent Vic's Markets who are representatives or agents of the Respondent Steelworkers from utilizing the Mars Shop 'N Save facility for organizational purposes during the notice posting period, the proposed settlement agreements inadequately remedy the alleged unfair labor practices because they do not provide Local 23 with any countervailing special access remedies;
>
> (4) The proposed settlement agreements inadequately remedy the alleged unfair labor practices because they are not formal settlements providing for Board approval, a Board order and the consent entry of a court judgment enforcing the order;
>
> (5) The proposed settlement agreements inadequately remedy the alleged unfair labor practices because they contain non-admission clauses whereby the Respondent Vic's Markets and the Respondent Steelworkers do not admit to any violation of the National Labor Relations Act; and
>
> (6) The proposed Notices to Members contain ambiguous language which, if posted, will confuse employees concerning the factual background of the settlements and the exercise of their Section 7 rights.

App. 101-102.

Further, Local 23 requested that the Regional Director "afford Local 23 an evidentiary hearing on its objections to the proposed settlement agreements." App. 101.

By letter of December 12, 1984, the Regional Director informed Local 23 of his approval of the settlement agreements and the corresponding withdrawal of the Board's pending unfair labor practice complaints against Vic's Markets, Charley Bros. and the Steelworkers. Responding to Local 23's objections, the Director substantially rejected Local 23's contentions, although he did

modify some of the language in the proposed notices to employees to remedy alleged ambiguities noted in Local 23's objections. App. 109-110.

Local 23 thereupon appealed to the General Counsel of the Board the Regional Director's approval of the settlement agreements and his refusal to hold an evidentiary hearing. App. 127.[5] On January 22, 1985, the General Counsel denied Local 23's appeal. Referring to Local 23's argument that the Board's failure to hold an evidentiary hearing on its objections invalidated the informal settlement agreements, the General Counsel stated:

> It is the policy of this office, however, that a Charging Party's right to contest a proposed informal settlement agreement is properly and exclusively governed [sic] Sections 101.9(c)(1), (2), and 102.19 of the Board's rules and regulations. Inasmuch as the evidence indicates that these procedures were properly followed, insufficient basis exists to invalidate the settlement agreements on those grounds.

App. 132.

Following the General Counsel's denial of its administrative appeal, Local 23 filed a timely petition for review in this Court. For the reasons expressed below, we will grant Local 23's petition, vacate enforcement of the settlement agreements, and remand the proceedings to the Board for the purpose of holding an evidentiary hearing on Local 23's objections to the informal settlement agreements.

II.

In *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966), this court specifically addressed the issue presented by this appeal. There, we held that once a

[5] Local 23 withdrew objections two and three noted above as grounds for overturning the proposed settlement agreements. App. 128.

formal unfair labor practice complaint had been issued by the Board, a "charging party is entitled to an evidentiary hearing upon its objections to the proposed settlement agreement, be it formal or informal." 357 F.2d at 533. On this appeal, it cannot be disputed that *Leeds & Northrup* is controlling.[6]

Nevertheless, the Board vigorously argues that *Leeds & Northrup* "was wrongly decided and should now be overturned." NLRB Br. at 9. However, the Internal Operating Procedures of this Court, Chapter 8.C., flatly prohibit a panel of this court from overruling a published opinion of a previous panel.[7] *See, e.g., O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 354 (3d Cir. 1981), *cert. denied* 455 U.S. 1017 (1982); *Byrnes v. Debolt Transfer, Inc.*, 741 F.2d 620, 625 (3d Cir. 1984). Thus, this panel has no authority to depart from *Leeds'* holding, and unless the instant appeal may be distinguished from *Leeds*, we are obliged to remand for an evidentiary hearing.

III.

In *Leeds & Northrup*, the company claimed that the Union had coerced its employees during a plant strike by, among other things, threatening company employees with

[6] The Board and General Counsel "acknowledge that the Court's opinion in *Leeds & Northrup* is controlling in this case." NLRB Br. at 9.

[7] IOP 8.C. provides:

> C. Policy of Avoiding Intra-Circuit Conflict of Precedent.
>
> It is the tradition of this court that reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court in banc consideration is required to overrule a published opinion of this court.

Recognizing that *Leeds & Northrup* governed this appeal, on July 31, 1985 the Board sought initial in banc hearing prior to a panel's consideration of the instant appeal. That petition was denied by this court on September 5, 1985.

violence, loss of employment and union fines if they crossed the picket lines or refused to participate in strike activities. A formal complaint was filed by the Board against the Union for having violated 8(b)(1)(A) of the Act and a hearing before a trial examiner was scheduled. Prior to the hearing, the Regional Director and the Union entered into an informal settlement agreement without informing the company of the settlement.

The company, as a charging employer, filed a motion with the Regional Director seeking a hearing on the Board's complaint and also filed formal objections to the settlement ageement. The Regional Director nevertheless approved the settlement agreement, withdrew the Board's complaint, rejected Leeds' objections and denied Leeds' request for a hearing.

Leeds sought review with the General Counsel, who approved the Regional Director's action, observing that the unfair labor practices had ceased. Leeds thereupon appealed to this court, claiming the denial of an evidentiary hearing was a final action of the Board and sought to have the General Counsel's action set aside. The Board claimed that no final order had been entered and therefore this court had no jurisdiction to review the decisions of the Regional Director and the General Counsel. It also contended that no hearing was necessary because the unfair labor practices had been discontinued and the issue was therefore moot.

Rejecting the Board's position, this court held that there was no distinction between disposition of complaints by formal or informal settlements. The court held that no lack of jurisdiction precluded consideration of Leeds' appeal by the court. We went on to hold that once a complaint has issued, the charging party is entitled to an evidentiary hearing upon its objections to the proposed settlement agreement, be it formal or informal. We noted

that only where the General Counsel had, after investigation, elected *not* to issue a complaint, was his action to be deemed discretionary and within the exclusive power of the General Counsel to resolve. In *Leeds* because a formal complaint had issued, but no hearing had been allowed, the action of the Board was vacated and remanded for an evidentiary hearing.

Here, too, a formal complaint had issued, but the requested evidentiary hearing was denied. We can discern no principled distinction between *Leeds* and the instant case. Indeed, as we have noted, the Board apparently cannot either. *See* n.6 *supra*.

It may be argued that a distinction should be drawn between objections which raise material disputes of fact, and objections which involve merely procedural matters or discretionary determinations concerning the remedy, and that hearings should be required only where factfinding is essential. We have employed that type of analysis in analogous situations where we have required evidentiary hearings only in instances where the Regional Director's investigation had disclosed material disputes of fact. *See, e.g., Vitek Electronics, Inc. v. NLRB,* 653 F.3d 785 (3d Cir. 1981); *Anchor Inns, Inc. v. NLRB*, 644 F.2d 292 (3d Cir. 1981).

Such a distinction, however, while it may prove attractive to those who disagree with *Leeds* or to courts which encounter this problem as a matter of first impression, cannot control the disposition of this appeal. *Leeds*, as we have pointed out, is on virtually all fours with the instant case and, while the opportunity for such a distinction was available in *Leeds*, it was not seized. *Leeds'* holding leaves no room for such a distinction to be drawn here.

Thus, while Local 23's objections in this case do not bear on the substantive provisions of the informal settlement agreements, and a *Leeds* evidentiary hearing might therefore result in mere adherence to an empty formality,

nevertheless we, as a panel, even if we were so disposed, are not free to change or modify *Leeds* despite arguments, and ostensible precedents to the contrary.[8] *See International Ladies' Garment Workers Union v. NLRB,* 501 F.2d 823, 832-33 (D.C. Cir. 1974) (evidentiary hearing on objections to proposed informal settlement agreement not required where there are no genuine issues of material fact as to substantive relief provided); *see also Cuyahoga Valley Railway Co. v. United Transportation Union*, 54 U.S.L.W. 3299, 3300 (U.S. November 4, 1985) (Secretary of Labor's decision to withdraw complaint charging an employer with violation of the Occupational Health and Safety Act, 29 U.S.C. § 651, *et seq,* upon reaching informal settlement agreement not reviewable by the Occupational Safety and Health Review Commission).

IV.

Any attempt to modify the *Leeds* jurisprudence in this circuit necessarily must be accomplished by the full court and cannot be effected by a panel which is bound to follow prior precedent. Because, as we have observed, *Leeds* is controlling, we will grant Local 23's petition for review and thus remand to the Board. We will also vacate the informal settlement agreements, and direct that the unfair labor practice complaints be reinstated so that the evidentiary hearing on Local 23's objections may be held, all as required by *Leeds*.

---

[8] Subsequent to argument in this case, we have become aware of a recent decision of the Sixth Circuit holding that an informal settlement agreement reached after issuance of a formal complaint by the Regional Director of the NLRB is not a final order for purposes of review by a Court of Appeals, *Jackman v. NLRB*. No. 83-5073 (6th Cir. March 5, 1986). Referring to *Leeds & Northrup,* the *Jackman* court stated that our decision "misconstrue[d] the purposes and policy of the [National Labor Relations] Act." Slip op. at 10. n.13. Despite the conflict among the Circuits which today's affirmance of *Leeds* perpetuates, we are nevertheless constrained to adhere to *Leeds*.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, D.C. 20570

January 22, 1985

Re: Mars Shop 'N Save
United Steelwkrs. of America
and its Local 14744,
AFL-CIO-CLC
(Mars Shop 'N Save)
Case Nos. 6-CA-17529
6-CA-17666
6-CB-6512
6-CB-6590

Mr. Peter J. Ford, Staff Counsel
UFCW Int'l Union, AFL-CIO, CLC
1775 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Ford:

Your appeal from the Regional Director's approval of a unilateral informal settlement agreement in the captioned cases has been duly considered.

The appeal is denied substantially for the reasons set forth in the Regional Director's letter of December 12, 1984. You contend on appeal that the lack of your participation in settlement negotiations as well as the Regional Director's refusal to hold a hearing on objections to the settlement agreement invalidates the settlement citing Section 101. 9(a) of the Board's rules and regulations as well as cases cited in your appeal. It is the policy of this office, however, that a Charging Party's right to contest a proposed informal settlement agreement is properly and ex-

clusively governed [*sic*] Sections 101. 9(c)(1), (2) and 102.19 of the Board's rules and regulations. Inasmuch as the evidence indicates that these procedures were properly followed, insufficient basis exists to invalidate the settlement agreement on those grounds. Additionally, insufficient evidence was presented to establish that the Regional Director abused his discretion in approving an informal settlement agreement with a non-admission clause. In sum, it was concluded that the settlement agreement as obtained adequately remedies those violations found and effectuates the purposes and policies of the Act. Accordingly, further proceedings in this matter were deemed unwarranted.

Very truly yours,

Rosemary M. Collyer
General Counsel

By /s/MARY M. SHANKLIN,
Mary M. Shanklin, Director
Office of Appeals

APPENDIX C

NATIONAL LABOR RELATIONS BOARD
REGION 6

1501 William S. Moorhead Federal Building
1000 Liberty Avenue
Pittsburgh, Pa 15222
Telephone (412) 644-2977

December 12, 1984

Re: Mars Shop 'N Save
and United Steelworkers of
America and its Local 14744,
AFL-CIO-CLC
(Mars Shop 'N Save)
Case Nos. 6-CA-17529
6-CA-17666
6-CB-6512
6-CB-6590

United Food and Commercial Workers
International Union, AFL-CIO-CLC
1775 K Street, N.W.
Washington, D.C. 20006

Attention: Peter J. Ford, Staff Counsel

Dear Mr. Ford:

The above-captioned cases, charging a violation under Section 8 of the National Labor Relations Act, as amended, have been carefully investigated and considered.

As a result of the investigation, and in view of the undertakings contained in the enclosed Settlement Agreements, it does not appear that it would effectuate the purposes of the National Labor Relations Act to institute further proceedings at this time and I am approving the

Settlement Agreements. In reaching my decision in this regard, I have considered your objections to the Settlement Agreements and find them without merit.

With regard to the first objection claiming that the charging party was not provided with an opportunity to negotiate a non-Board adjustment, I note that the Charges in 6-CA-17529 and 6-CB-6512 were filed on August 9, 1984, and the Charges in 6-CA-17666 and 6-CB-6590 were filed on October 11, 1984. The instant Board settlements were not executed until the last week in November 1984, which was just one week from the date the above-captioned matters were scheduled for hearing. Accordingly, the charging party had ample opportunity to reach a non-Board adjustment if it so desired. I further find that formal settlements are not warranted under the circumstances and that the Board's Rules and the Agency's practice provides latitude for approval of informal settlements.

I also note that the 60 day notice posting period contained in the Settlement Agreements is the period of time historically used by the Agency to correct unlawful conduct like that alleged in the Complaints and is the posting period the Board normally would order upon a finding of a violation. Futhermore, the instant Settlement Agreements prohibit the Employer from granting assistance or support and from denying the charging party access while granting access to the Steelworkers. In the event the Employer hires agents and/or representatives of the United Steelworkers of America, AFL-CIO-CLC who are on the Union's payroll as the charging party speculates might occur, additional charges may be filed and a determination will be made after all the facts have been gathered. I am, therefore, withdrawing the complaints in the above-captioned matter and refusing to issue a new Complaint.

The inclusion of non-admissions clauses in the Settlement Agreements, which agency practice allows in order to promote settlement, does not warrant a contrary conclusion since the Settlement Agreements adequately remedy the unfair labor practices involved. The Notices have been modified to correct the alleged ambiguous language and to more fully conform to the outstanding Complaints and Notice of Hearing. More specifically, the first paragraph of the proposed notices in 6-CB-6512 and 6-CB-6590 were modified as follows: the term "our employees" was corrected to read the "Employers employees" ' and the term "until they are certified" was corrected to read "until we are certified." In addition, the following paragraphs were added to the notice in 6-CA-17529; We will not give assistance and support to United Steelworkers of America and its Local 14744, AFL-CIO-CLC, by destroying authorization cards given to employees by United Food and Commercial Workers Union, Local 23, AFL-CIO-CLC; [*sic*] We will not fraudulently and by subterfuge utilize employee meeting attendance lists as employee collective-bargaining agreement ratification lists.

Please note the attachment setting forth the procedure for filing an appeal.

Very truly yours,

/s/ GERALD KOBELL
Gerald Kobell
Regional Director

ajl
Enclosures
Page 3. Parties receiving copies.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3116

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 23, AFL-CIO-CLC, PETITIONER

v.

N.L.R.B., ET AL., RESPONDENTS

On Petition for Review of the Final Order from the National Labor Relations Board

JUDGMENT

Present: GARTH, STAPLETON, *Circuit Judges* and FULLAM, *District Judge*

After consideration of all contentions and evidence submitted by the parties, it is

ADJUDGED AND ORDERED that the Petitioner's petition for review is granted, enforcement of the informal settlement agreements is vacated, and the proceedings are remanded to the Board for the purposes of holding an evidentiary hearing on the Petitioner's objections to the informal settlement agreements and the reinstatement of the unfair labor practice complaints, consistent with the Court's April 16, 1986 opinion.

Each side to bear its own costs.

BY THE COURT

/s/ LEONARD I. GARTH
Circuit Judge

Dated: May 15 1986

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-3116
Board No. 6-CA-17529

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 23, AFL-CIO-CLC, PETITIONER

v.

N.L.R.B., ET AL, RESPONDENTS

On Petition for Review of the Final Order from the National Labor Relations Board

---

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge,*
SEITZ, ADAMS, GIBBONS, HUNTER, WEIS,
GARTH, HIGGINBOTHAM, SLOVITER, BECKER,
STAPLETON and MANSMANN, *Circuit Judges,*
and FULLAM, *District Judge**

The petition for rehearing filed by respondents, National Labor Relations Board and General Counsel Rosemary M. Collyer, in the above-entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ LEONARD I. GARTH
Circuit Judge

DATED: JUN 13 1986

APPENDIX F

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 3(d) of the National Labor Relations Act, 29 U.S.C. 153(d) provides:

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. * * *

2. Section 10 of the National Labor Relations Act, 28 U.S.C. 160, provides in pertinent part:

> (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.
>
> (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency

> designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. * * *
>
> (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter * * *. Such order may further require such person to make reports from time to time

showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

* * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

3. 5 U.S.C. 701(a) provides:

(a) This chapter applies, according to the provisions thereof, except to the extent that–

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

4. Sections 101.6 through 101.9 of the Board's Statements of Procedure, Series 8, 29 C.F.R. 101.6-101.9, provide:

Sec. 101.6 *Dismissal of charges and appeals to general counsel.*– If the complainant refuses to withdraw the charge as recommended, the regional director dismisses the charge. The regional director thereupon informs the parties of his action, together with a simple statement of the grounds therefor, and the complainant of his right of appeal to the general counsel in Washington, D.C., within 10 days. If the complainant appeals to the general counsel, the entire file in the case is sent to Washington, D.C., where the case is fully reviewed by the general counsel with the assistance of his staff. Oral presentation of the appeal issues may be permitted a party on timely written request, in which event the other parties are notified and afforded a like opportunity at another appropriate time. Following such review, the general counsel may sustain the regional director's dismissal, stating the grounds of his affirmance, or may direct the regional director to take further action.

Sec. 101.7 *Settlements.*–Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing

conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel, as described in section 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

Sec. 101.8 *Complaints.*—If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the regional director institutes formal action by issuance of a complaint and notice of hearing. In certain types of cases, involving novel and complex issues, the regional director, at the discretion of the general counsel, must submit the case for advice from the general counsel before issuing a complaint. The complaint, which is served on all parties, sets forth the facts upon which the Board bases its jurisdiction and the facts relating to the alleged violations of law by the respondent. The respondent must file an answer to the complaint within 10 days of its receipt, setting forth a statement of its defense.

Sec. 101.9 *Settlement after issuance of complaint.*—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or

even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b)(1) After the issuance of a complaint, the agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, D.C. In such an agreement, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(2) In some cases, however, the regional director, pursuant to his authority to withdraw the complaint before the hearing (§ 102.18 of this chapter), may conclude that an informal settlement agreement of the type described in § 101.7 is appropriate. Such an agreement is not subject to approval by the Board and does not provide for a Board order. It provides for the withdrawal of the complaint.

(c)(1) If after issuance of complaint but before opening of the hearing, the charging party will not join in a settlement tentatively agreed upon by the regional director, the respondent, and any other parties whose consent may be required, the regional director serves a copy of the proposed settlement agreement on the charging party with a brief written statement of the reasons for proposing its approval. Within 5 days after service of these documents, the charging party may file with the regional director a written statement of any objections to the proposed

settlement. Such objections will be considered by the regional director in determining whether to approve the proposed settlement. If the settlement is approved by the regional director notwithstanding the objections, the charging party is so informed and provided a brief written statement of the reasons for the approval.

(2) If the settlement agreement approved by the regional director is a formal one, providing for the entry of a Board order, the settlement agreement together with the charging party's objections and the regional director's written statements, are submitted to Washington, D.C., where they are reviewed by the general counsel. If the general counsel decides to approve the settlement agreement, he shall so inform the charging party and submit the agreement and accompanying documents to the Board, upon whose approval the settlement is contingent. Within 7 days after service of notice of submission of the settlement agreement to the Board, the charging party may file with the Board in Washington, D.C., a further statement in support of his objections to the settlement agreement.

(3) If the settlement agreement approved by the regional director is an informal one, providing for the withdrawal of the complaint, the charging party may appeal the regional director's action to the general counsel, as provided in section 102.19 of this chapter.

(d)(1) If the settlement occurs after the opening of the hearing and before issuance of the administrative law judge's decision and there is an all-party informal settlement, the request for withdrawal of the complaint must be submitted to the administrative law judge for his approval. If the all-party settlement is a

formal one, final approval must come from the Board. If any party will not join in the settlement agreed to by the other parties, the administrative law judge will give such party an opportunity to state on the record or in writing its reasons for opposing the settlement.

(2) If the administrative law judge decides to accept or reject the proposed settlement, any party aggrieved by such ruling may ask for leave to appeal to the Board as provided in § 102.26 of this chapter.

(e)(1) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition the court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board Order, the Board may petition the court for enforcement of its order, pursuant to section 10 of the National Labor Relations Act.

(2) In the event the respondent fails to comply with the terms of an informal settlement agreement, the regional director may set the agreement aside and institute further proceedings.

5. Section 102.18 of the Board's Rules and Regulations, Series 8, 29 C.F.R. 102.18, provides:

> Any such complaint may be withdrawn before the hearing by the regional director on his own motion.

U.S. GOVERNMENT PRINTING OFFICE: 1986—181-483/40031

OPPOSITION

BRIEF

No. 86-594

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Petitioner,

v.

UNITED FOOD AND COMMERCIAL WORKERS
INTERNATIONAL UNION LOCAL 23, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

GEORGE MURPHY
(Counsel of Record)
PETER FORD
1775 K Street, N.W.
Washington, D.C. 20006
(202-223-3111)

LAURENCE GOLD
DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-594

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Petitioner,

v.

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION LOCAL 23, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The citations to the opinions below and the basis for this Court's jurisdiction are correctly set forth in the petition for a writ of certiorari at p. 1. The relevant statutory provisions are contained in the appendix to the petition for a writ of certiorari. For present purposes, respondent accepts in principle the statement of the case set forth in the petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The bulk of the National Labor Relations Board's ("NLRB" or "the Board") certiorari petition is devoted to arguing that the decision below "is plainly incorrect"

and "cannot be reconciled with the plain language of the National Labor Relations Act." Pet. at 13, 11; see *id.* at 13-20, 21-23. That argument—while fatally flawed, see Part III, *infra*—would at least be to the point if the Court had granted a writ of certiorari and had thereby signified its agreement that the question the Board seeks to present warrants full-dress consideration. But the Court has not done so, and the determinative issue at present is whether this case is worthy of this Court's limited time. The Board makes only the most cursory attempt to so argue.

The reason the Board focuses so heavily on the merits of the dispute is plain: as we show the decision below simply does not raise a question of substantial importance. Rather, the Board is seeking to have this Court resolve a minor and parochial controversy merely because, in the Board's (incorrect) view, the lower court's position is erroneous. That, of course, is not what this Court sits to do. Our demonstration in this regard proceeds in two parts.

In Part I we show that the decision below merely reaffirms a twenty-year-old decision by the Third Circuit in *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3rd Cir. 1966), holding informal settlements of unfair labor practice complaints to be judicially reviewable. In the two decades since *Leeds & Northrup* was decided, there have been only a handful of cases in which the charging party has been sufficiently dissatisfied with an informal settlement to seek judicial review. Neither the availability of such review nor the few cases in which review has been sought have impaired in any way the ability of the General Counsel to secure informal settlements. Thus, the Board's professed fear here that the decision below "threaten[s] to impede" or "will adversely affect" the settlement process, Pet. at 11, 24, is without substance.

In Part II we demonstrate that in the few cases involving informal settlements that have arisen subsequent to *Leeds & Northrup*, the trend is to distinguish between various types of informal settlements, holding some to be reviewable and others unreviewable. The distinction that has thus been developed serves to reconcile the decision of the Sixth Circuit in *Jackman v. NLRB*, 784 F.2d 759 (6th Cir. 1986), refusing to review an informal settlement, with the decision below. That being so, we submit that the NLRB is wrong in claiming "a square conflict between courts of appeals concerning the reviewability of the General Counsel's decision to withdraw a complaint prior to hearing in connection with an informal settlement." NLRB Pet. at 12. And because the appellate court law is in a process of evolution, this is an area in which it is appropriate for the Court to withhold intervention until this healthy process of litigating elucidation has run its course.

I.

In *Leeds & Northrup* the Third Circuit held that for purposes of judicial review, "there was no distinction between disposition of complaints by formal or informal settlements" and therefore "no lack of jurisdiction precluded consideration of Leeds' appeal [from an informal settlement] by the court." Pet. App. 10a. Given that holding, the decision below properly treats *Leeds & Northrup* as "controlling," *id.* at 9a, 12a, recognizing that *Leeds* "is on virtually all fours with the instant case," *id.* at 11a. Thus, as the Board correctly states in its certiorari petition, the Third Circuit in this case merely "followed its earlier decision in *Leeds & Northrup*." Pet. at 9.

Leeds & Northrup was decided over twenty years ago. In the ensuing two decades, only four cases, including the instant case, have arisen in which a charging party has sought judicial review of an informal settlement. *ILGWU v. NLRB*, 501 F.2d 823 (D.C. Cir. 1974); *George Banta*

Co. v. NLRB, 626 F.2d 354 (4th Cir. 1980); *Jackman v. NLRB*, *supra*.[1] Thus, contrary to the Board's assertion in its petition, as a practical matter, the question of the reviewability of informal settlements, is *not* of "substantial importance in the administration of the National Labor Relations Act." Pet. at 11.

Nor is the paucity of cases in this area in any way inexplicable. Under the Board's regulations, before the General Counsel may issue a complaint, she must have conducted an investigation of the unfair labor practice charge, concluded that "the charge appears to have merit," and attempted "to dispose of [the charge] by informal adjustment." 29 C.F.R. § 101.8. In these circumstances, the fact that the General Counsel issues a complaint means that her view of the merits of the dispute and that of the charging party are congruent. It is thus to be expected that in the run of cases, the General Counsel will not accede to a settlement that disserves the charging party's needs.

Moreover, the Board's regulations provide that where a tentative settlement is not acceptable to the charging party, the General Counsel (through the regional director to whom the authority to enter into such settlements has been delegated) is to provide the charging party "with a brief written statement of the reasons for proposing [the settlement's] approval," and is to afford the charging party an opportunity to submit objections to the proposed settlement. 29 C.F.R. § 101.9(c)(1). Any such objections "will be considered by the regional director in

[1] In two other cases, review was sought of a settlement that was not embodied in a Board order, but that was arrived at after a hearing had commenced and hence was submitted to an Administrative Law Judge for approval. *Oshkosh Truck Corp. v. NLRB*, 530 F.2d 744 (9th Cir. 1976); *George Ryan Co. v. NLRB*, 609 F.2d 1249 (9th Cir. 1979). Those cases do not raise the same jurisdictional issue that is presented in this case.

determining whether to approve the proposal settlement." *Id.* And, if the settlement is approved notwithstanding the objections the charging party is to be "provided a brief written statement of the reasons for the approval," *id.*, as well as an opportunity to "appeal the regional director's action to the general counsel," *id.* § 101.9(c)(3). Thus, the procedure for reaching post-complaint, informal settlements is designed to provide an opportunity for reasoned consideration and resolution of any concerns of a charging party concerning a proposed settlement.

In light of the foregoing, it is hardly surprising that the decision in *Leeds & Northrup*, *supra*, has not proved to be either a fertile source of litigation or a hindrance to the General Counsel in reaching informal settlements after a complaint is issued. The point is best made by statistical evidence.

As we have pointed out, only four charging parties have gone to court to protest a settlement over the past twenty years. Moreover, in fiscal year 1982—the most recent year for which statistics are available—the General Counsel issued 6,477 complaints and reached post-complaint, informal settlements in 3,803 cases, almost 60% of the total. 48 NLRB Ann. Rep. 168, 183. In contrast, in fiscal year 1964—the last fiscal year before *Leeds & Northrup*—the General Counsel issued 2,498 complaints and reached post-complaint, informal settlements in 676 cases, approximately 25% of the total. 30 NLRB Ann. Rep. 181, 188. *Thus, over the two decades since Leeds & Northrup the proportion of cases resolved by post-complaint, informal settlements has more than doubled.* The NLRB's professed fear that the decision below reaffirming *Leeds & Northrup* will "threaten to impede" or "adversely affect" the informal settlement process, Pet. at 11, 24, is therefore plainly without substance.

II.

The Board's claim that review is warranted here to resolve a "square conflict" between the circuits is also unfounded; although the ruling below and the Sixth Circuit's decision in *Jackman v. NLRB, supra*, appear inconsistent on their face, decisions of the two other appellate courts to address this issue suggest that the seeming disagreement is reconcilable. Thus it cannot be said with assurance that the lower-court law has hardened into an actual conflict.

The first case after *Leeds & Northrup* to consider the reviewability of an informal settlement was *ILGWU v. NLRB, supra*. In that case, a union objected to an informal settlement principally on the ground that the settlement contained a non-admissions clause which would defeat the attempt to cure the violations charged in the complaint. After reviewing the structure and history of the Act, the District of Columbia Circuit, per MacKinnon J., "agree[d]," for reasons discussed *infra* at 10-1, "with the result in *Leeds & Northrup* as to jurisdiction." 501 F.2d at 831 n.27. At the same time, however, the D.C. Circuit took pains to "emphasize the narrow contour of our holding." *Id.* at 831. Judge MacKinnon stated:

> [I]t is readily apparent that the prosecutorial role may at times blend with the adjudicatory role . . . Thus, after a complaint has issued and the administrative process initiated, certain actions which broadly conceived might be characterized as "prosecutorial" assume essential adjudicatory attributes. Such is the case where the General Counsel, acting for the Board, withdraws a complaint on the basis of an informal settlement agreement which provides for an adjustment of the conflicting interests of the private parties and thus partially or wholly remedies the underlying labor disputes. This action cannot meaningfully be distinguished from other types of Board action traditionally held to be within the review provisions of Section 10(f). [501 F.2d at 831]

In *George Banta Co. v. NLRB, supra*, the Fourth Circuit followed the intimations of *ILGWU* to deny review of an informal settlement. In that case, after issuing a complaint alleging that initiation fees charged by a union were both excessive and discriminatory, the General Counsel became persuaded that "he could not prove the charge of discrimination," 626 F.2d at 325; accordingly, the General Counsel reached a settlement which provided only for a reduction of the initiation fee (thus curing the excessiveness concern). The charging party objected to the settlement on the ground that nothing was done to cure the alleged discrimination. The Fourth Circuit held that it lacked jurisdiction to entertain that objection.

Following the suggestions of *ILGWU*, the Fourth Circuit concluded that "[i]t is the character of the decision [to settle a complaint] which is critical" to the existence of appellate jurisdiction. 626 F.2d at 356. That court explained: "[w]here, as here, the decision is fundamentally prosecutorial—based essentially upon a determination that the available evidence will not support prosecution of the alleged violation—we hold that we lack jurisdiction to review," reasoning that "the authority vested in General Counsel over the prosecution of complaints 'must include the power to determine whether a complaint can be successfully prosecuted and, if he thinks not to drop it.'" *Id.* at 356-57. The Fourth Circuit distinguished *ILGWU* and *Leeds & Northrup* on the ground that those cases

> involved the withdrawal of charges pursuant to an informal settlement agreement which adjusted conflicting interests . . . In the instant case, despite the fact that the settlement agreement may be read to include dismissal of the discrimination charge as well as to settle the charge that the initiation fee was excessive, we think that the decision not to proceed with the discrimination charge was based essentially upon the independent conclusion that the available evidence was insufficient to prove the charge. It was not relinquishment of a cause of action hav-

> ing possible merit in an effort to achieve other objectives; it was recognition that a cause of action could not be proved. As such, it was an unreviewable prosecutorial decision. [*Id.* at 357] [2]

The dichotomy suggested by the D.C. Circuit in *ILGWU* and expressly drawn by the Fourth Circuit in *George Banta* provides a means of reconciling the decision below with the Sixth Circuit's decision in *Jackman*.

Jackman involved a challenge to an informal settlement of a complaint alleging a discriminatory layoff; the settlement did not provide the charging party with reinstatement or full backpay. The Regional Director accepted the settlement because he discovered that subsequent to the layoff, Jackman "had sabotaged Company property and had made damaging telephone calls to Company customers," 784 F.2d at 759; under prevailing Board law, such conduct results in the forfeiture of any right to reinstatement.[3] Thus, the "character of the decision" the charging party sought to challenge in *Jackman*, was "fundamentally prosecutorial," *George Banta*, 626 F.2d at 356: the General Counsel had concluded that the claim for reinstatement and backpay in the complaint was meritless in light of the charging party's subsequent conduct. Indeed, in concluding that it lacked jurisdiction to review the charging party's challenge, the Sixth Circuit reasoned (as had the Fourth Circuit in *George Banta*), that "[t]he authority to initiate and prosecute complaints granted to General Counsel by Section 3(d) 'must include the power to determine whether a complaint can be successfully prosecuted and, if he thinks not, to drop it.'" 784 F.2d at 764.

---

[2] In *Machinists v. Lubbers*, 681 F.2d 598 (9th Cir. 1982), *cert. denied*, 459 U.S. 1201, the Ninth Circuit accepted the reasoning of the Fourth Circuit in *George Banta* in the course of declining to review a decision by the General Counsel to dismiss a complaint. *See id.* at 604-05.

[3] *See, e.g., Renfro Hosiery Mills Inc.*, 122 NLRB 929 (1959); *NLRB v. Binn Dictator Co.*, 356 F.2d 210 (6th Cir. 1966).

The instant case, in contr[illegible], is like *Leeds & Northrup* and *ILGWU* and unlike *George Banta* and *Jackman*. The General Counsel has not and does not question the validity of the claims asserted in her complaint. Rather, she has "relinguish[ed] . . . a cause of action having possible merit," *George Banta*, 626 F.2d at 357, based on her essentially "adjudicatory" determination, *ILGWU*, 501 F.2d at 831, that the informal settlement provides adequate relief for the violations alleged in the complaint. Thus, the holding below subjecting the General Counsel's decision in this case to judicial review is not necessarily in conflict with the decision in *Jackman*.

The short of the matter, then, is this. Unless and until the Sixth Circuit refuses jurisdiction in a case involving an "adjudicatory" decision, or the Third Circuit assumes jurisdiction over a "prosecutorial" decision, it cannot be said with assurance that there is a true conflict between the circuits. That being so, and since the law in the appellate courts in this area is still evolving, review by this Court at this time would be premature.

III.

What we have shown in Parts I and II establishes that the NLRB's certiorari petition does not raise a question warranting this Court's attention. Nonetheless, because the Board goes to such lengths in its petition to attack the merits of the Third Circuit's decision, a brief response to that attack is in order.

1. Section 10(f) of the NLRA, 29 U.S.C § 160(f), provides in pertinent part, as follows:

> Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged.

It is undisputed in this case that, upon the consummation of the informal settlement, a "final order" was en-

tered dismissing the complaint, and that the respondent here is "aggrieved" by that final order. Thus, the reviewability of that order turns on whether the order, which was entered by the General Counsel, is an "order of the Board" within the meaning of § 10(f).

Section 3(d) of the Act, 29 U.S.C. § 153(d) answers that question in terms. For that section provides for a General Counsel "of the Board" who "shall have final authority, *on behalf of the Board*, in respect of the . . . issuance of complaints . . . and in respect of the prosecution of such complaints . . ." (Emphasis added). As the D.C. Circuit concluded in *ILGWU*, that provision "indicates a congressional intent that the actions of the General Counsel in dealing with unfair labor practices were to constitute Board action" and thus to be reviewable under § 10(f). 501 F.2d at 830.[4]

2. This conclusion is confirmed by a review of the legislative history of the Labor Management Relations Act of 1947 ("LMRA"), the Act which created the office of General Counsel and vested her with "final authority on behalf of the Board . . . in respect of the prosecution of . . . complaints . . ." In *ILGWU* Judge MacKinnon carefully reviewed that history; his analysis bears quoting at length.

---

[4] That an order entered by the General Counsel dismissing a complaint is reviewable under § 10(f) does not mean, as the Board claims, *see*, Pet. at 15 n.7, that "*all decisions* of the General Counsel . . . would [be] subject to judicial review "(emphasis added." By its terms, § 10(f) provides for review only of "final *orders*", and thus can be invoked only when the General Counsel enters an *order* "on behalf of the Board."

Nor, as the Board suggests (*see* Pet. at 13-14), is the separation of the prosecutorial and adjudicative functions be threatened by the holding that, for purposes of judicial review, an order of the General Counsel entered "on behalf of the Board" is to be treated as an order of the Board. That holding does not empower the agency to review the General Counsel's order; as between the General Counsel and the Board, § 3(d) states unequivocally that the General Counsel has "final authority" to act for the Board.

Judge Mackinnon began by reviewing the state of the law with respect to the reviewability of settlements prior to the enactment of the LMRA:

> Prior to 1947 the Board itself was charged with the duty of determining whether to issue unfair labor practice complaints and how they should be prosecuted, for there was no office of the General Counsel. Thus the Board simultaneously played the roles of prosecutor, jury and judge. Under this statutory structure, it was held that the courts lacked jurisdiction to review a refusal by the Board to issue a complaint. Once issued, however, the court's could review either the complaint's dismissal or the grant of remedial relief premised on the charges contained in such complaint. Thus the issuance of a complaint initiated an administrative process whose end result was subject to review in the Court of Appeals. [*Id.* at 821: footnotes omitted]

Judge MacKinnon next examined Congress' purpose in 1947 in creating an independent General Counsel:

> This office was created in response to heavy criticism of the unfair and uneven results obtained from the amalgamation of prosecutorial and judicial functions in the old Board. The General Counsel was now to act independently of the Board, but in its name and on its behalf, in the issuance and prosecution of unfair labor practice complaints. [*Id.*]

Finally, Judge MacKinnon observed that "one justifiably would expect to find some evidence in the legislative history indicating an intent by the Congress to restrict the jurisdiction of the courts if that indeed were the case." *Id.* at 830 n.25. But far from containing any such evidence, "the broadening of the scope of review powers of the Courts of Appeals by the 1947 amendments suggests an even greater reliance on judicial review of unfair labor practice proceedings." *Id.*

In light of this history, Judge MacKinnon concluded that "the jurisdiction of the Court of Appeals under the

1935 Act continued unchanged by the 1947 amendments." *Id.* at 830. Congress intended the General Counsel "to be completely independent of a Board with which it had grown dissatisfied," *id.* at 829, but Congress did not intend that "putative Board action reviewable under Section 10(f) [would be] made unreviewable because taken by the General Counsel," *id.* at 830.[5]

Thus, even if this Court were to sit as a court of errors and appeal to correct mistaken decisions of the lower courts, the instant case still would not warrant review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE MURPHY
(Counsel of Record)
PETER FORD
1775 K Street, N.W.
Washington, D.C. 20006
(202-223-3111)

LAURENCE GOLD
DAVID SILBERMAN
815 16th Street, N.W.
Washington, D.C. 20006
(202-637-5390)

---

[5] Because an order dismissing an informal complaint as part of an informal settlement is reviewable under § 10(f), is is not necessary to consider here the availability of review under the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* *See* NLRB Pet. at 15-19. Accordingly, the Board's reliance on *Heckler v. Chaney*, —— U.S. ——, 53 L.W. 4385 (March 20, 1985), and *Cuyahoga Valley Railway Co. v. United Transportation Union*, —— U.S. ——, 54 L.W. 3299 (Nov. 4, 1985), each of which arose under the APA (and neither of which involved administrative action under the NLRA), is misplaced.

REPLY BRIEF

(3)

No. 86-594

In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD AND
ROSEMARY M. COLLYER, GENERAL COUNSEL,
NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 23, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board
Washington, D.C. 20570

8pp

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-594

NATIONAL LABOR RELATIONS BOARD AND
ROSEMARY M. COLLYER, GENERAL COUNSEL,
NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 23, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

---

1. Respondent asserts (Br. in Opp. 3, 6) that the courts of appeals have not reached conflicting conclusions with respect to the first issue presented in our petition—whether a charging party may obtain judicial review of the General Counsel's decision to enter into an informal settlement and withdraw an unfair labor practice complaint prior to commence-

ment of the administrative hearing.[1] Respondent is simply wrong. The Third Circuit, reaffirming its decision in *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527, 533 (1966), held in the present case that the General Counsel's decision is subject to judicial review. See also *ILGWU* v. *NLRB*, 501 F.2d 823 (D.C. Cir. 1974) (adopting the same rule). The Sixth Circuit concluded in *Jackman* v. *NLRB*, 784 F.2d 759, 763 (1986), that the General Counsel's decision to settle a case informally prior to hearing is not reviewable. These courts both acknowledged that their decisions are in conflict. See Pet. App. 12a n.8; *Jackman*, 784 F.2d at 764 n.13.

Respondent attempts to reconcile the opposing results reached by the courts of appeals by distinguishing between "adjudicatory" settlements and "prosecutorial" settlements. In respondent's view (Br. in Opp. 9) the Third Circuit rule may be limited to situations in which the withdrawal of the complaint is "adjudicatory" in that it is based on the decision that "the informal settlement provides adequate relief." The Sixth Circuit rule, on the other hand, supposedly applies to "prosecutorial" judgments, in which the General Counsel accepts a settlement because a claim is "meritless" (*id.* at 8). It is not clear, according to respondent (*id.* at 9), that the Third Circuit would assert jurisdiction over "prosecutorial" settlements or that the Sixth Circuit would deny jurisdiction over "adjudicatory" settlements.

Respondent's distinction between "prosecutorial" and "adjudicatory" settlements is wholly illusory. In

[1] We note that respondent does not contest our showing of a conflict as to the second issue presented for review—whether the Board must hold an evidentiary hearing whenever a charging party challenges a settlement.

both the present case (Pet. App. 6a-8a) and *Jackman* (784 F.2d at 761), the charged party agreed to some, but not all, of the relief sought by the charging party. And in both cases the General Counsel found that the charging party was not entitled to certain relief (Pet. App. 6a-7a; 784 F.2d at 761). Indeed, every decision whether to accept a settlement requires consideration of both the strength of the case on the merits and the adequacy of the remedy to be provided under the settlement. Thus, it may serve the policies of the Act to accept a settlement with a relatively lenient remedy when the evidence of a violation is weak; on the other hand, the General Counsel might insist upon more severe sanctions when the evidence on the merits is stronger. Respondent has thus failed to identify any meaningful distinction between the two cases.

Moreover, neither of the courts of appeals relied upon the distinction proffered by respondent. Each court stated that it was adopting a rule governing *all* withdrawals of complaints prior to the administrative hearing. And the reasoning of the courts of appeals does not allow for the distinction created by respondent. Thus, the Third and District of Columbia Circuits concluded that the issuance of the complaint transforms the proceeding into one in which the settlement is subject to judicial review. Pet. App. 10a-11a; *Leeds & Northrup* v. *NLRB*, 357 F.2d at 531-532; see also *ILGWU* v. *NLRB*, 501 F.2d at 831. The Sixth Circuit also rested its decision on the general nature of the decision to enter into a settlement (*Jackman*, 784 F.2d at 762-764).[2]

[2] Insofar as respondent finds (Br. in Opp. 6-7) support for its distinction in *George Banta Co.* v. *NLRB*, 626 F.2d 354

Indeed, respondent itself, in its discussion addressing the merits of this issue (Br. in Opp. 9-12), does not advance a construction of the National Labor Relations Act that allows for a distinction between "prosecutorial" and "adjudicatory" settlements. Respondent argues that because Section 3(d) of the Act, 29 U.S.C. 153(d), states that the General Counsel exercises her authority "on behalf of the Board," any action by the General Counsel which resolves a case is a "final order of the Board" subject to judicial review under Section 10(f) of the Act, 29 U.S.C. 160(f). We have already shown that this argument is legally erroneous (Pet. 15 n.7, 17-19); what is noteworthy here is that under respondent's own argument Section 10(f) would not be limited to "adjudicatory" settlements, but would encompass *all* decisions by the General Counsel approving informal settlements and withdrawing complaints. Respondent's own view of the statute therefore confirms both the spuriousness of its purported distinction and the existence of a conflict among the courts of appeals regarding this issue.

2. Nor is there merit to respondent's contention (Br. in Opp. 3-5) that the issues presented in the petition are not appropriate for review by this Court because relatively few charging parties have sought judicial review of informal settlements. First, as we discuss in the petition (at 23-24), informal settlements are an important enforcement mechanism. To

---

(4th Cir. 1980), that fact merely shows a further division among the courts of appeals concerning the reviewability of informal settlements. Indeed, the fact that neither the court below nor the *Jackman* court referred to that decision confirms that those courts did not adopt the narrow rules devised by respondent.

avoid confusion, and possible disruption of the Board's procedures, the rules governing informal settlements should be clear. Review is appropriate here because the decisions of the Third and District of Columbia Circuits raise significant questions about the availability of judicial review.

Second, respondent totally ignores the second question raised in the petition—whether the court of appeals correctly held that a charging party who objects to a settlement is entitled to an evidentiary hearing on its objections. As we have discussed (Pet. 20-21), the Third Circuit stands alone in its view that the charging party must always be accorded an evidentiary hearing when it objects to a settlement. That holding is not limited to informal settlements by the General Counsel, but extends to formal settlements approved by the Board. Thus, the Third Circuit's decision does more than subject a limited category of informal settlements to judicial scrutiny. It requires the Board to establish a hearing procedure for the resolution of a charging party's objections to any settlement proposed by the Board or the General Counsel; such a procedure is not only unnecessary under the Act, it would discourage charged parties from entering into settlements (see Pet. 22-23).

Third, the present state of the law, under which a charging party in the Third and District of Columbia Circuits is entitled to judicial review of its objections to an informal settlement but charging parties in other parts of the country have no such right, flies in the face of this Court's repeated admonition that in enacting the National Labor Relations Act Congress intended that there be "uniform application" of statutory rules and procedures (*Garner* v. *Teamsters Local Union No. 776*, 346 U.S. 485, 490

(1953)). Effectuation of a uniform national labor policy requires the clarification by this Court of the procedures governing informal settlements.

For the foregoing reasons, and the reasons set forth in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

DECEMBER 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 181483 40165

AMICUS CURIAE

BRIEF

No. 86-594

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD AND
ROSEMARY M. COLLYER, GENERAL COUNSEL,
NATIONAL LABOR RELATIONS BOARD,
Petitioners

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 23, AFL-CIO,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
PAULA J. CONNELLY
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN S. IRVING
Counsel of Record
GLENN SUMMERS
DEANNA R. DUBY
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000
Counsel for the Amicus Curiae
Chamber of Commerce of the United States

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-594

NATIONAL LABOR RELATIONS BOARD AND
ROSEMARY M. COLLYER, GENERAL COUNSEL,
NATIONAL LABOR RELATIONS BOARD,
Petitioners

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 23, AFL-CIO,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States ("Chamber") is the nation's largest federation of businesses, with a membership consisting of more than 180,000 cor-

---

[1] This brief is being filed with the consent of the parties, pursuant to Supreme Court Rule 36.2. The consent letters have been filed with the Clerk of the Court.

porations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. An important aspect of the Chamber's activities is presenting its members' views on business issues before all branches of the federal government. In this capacity, the Chamber has participated as *amicus curiae* in a number of cases involving the interpretation of statutes governing the relations of labor and the business community.

The provision of the National Labor Relations Act ("Act"), 29 U.S.C. § 151 *et seq.* (1982), at issue in this case grants authority to the General Counsel of the National Labor Relations Board ("NLRB" or "Board") to prosecute charges of unfair labor practice. There is no provision in the Act for judicial review of the exercise of that authority. The Chamber's concern is the prompt and fair resolution of unfair labor practice charges and the sound administration of the Act during this resolution process. If the United States Court of Appeals for the Third Circuit is upheld and judicial review is held to be available to charging parties after an informal settlement between the General Counsel and the charged party, the disputes now handled so expeditiously by the NLRB General Counsel will be unduly delayed and prolonged, and all aspects of business will suffer.

Because the Chamber is uniquely qualified to present to the Court the broad business perspective on this important issue, it submits this brief and urges the Court to reverse the decision of the court of appeals.

ARGUMENT

I. THE GENERAL COUNSEL'S DECISION TO WITHDRAW AN UNFAIR LABOR PRACTICE COMPLAINT PURSUANT TO AN INFORMAL SETTLEMENT AGREEMENT IS AN EXERCISE OF THE PROSECUTORIAL AUTHORITY GRANTED HER BY STATUTE AND IS NOT SUBJECT TO JUDICIAL REVIEW.

In this case, the General Counsel of the NLRB entered into an informal settlement with the charged parties in an unfair labor practice case after a complaint had issued but before the commencement of a hearing before an administrative law judge. Pursuant to the informal settlement, the General Counsel withdrew the complaint. The charging party, Local 23, objected to the settlement and withdrawal of the complaint and appealed to the NLRB General Counsel pursuant to Section 102.19 of the Board's Rules and Regulations. When the settlement was upheld over the charging party's objections, Local 23 petitioned the court of appeals for review, seeking an evidentiary hearing on its objections to the settlement. The court of appeals considered itself bound by its holding in *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966), and ruled that Local 23 was entitled to a hearing. The court held that once a complaint has issued, there is no distinction between disposition of complaints by formal or informal settlement and both are subject to judicial review.

Section 3(d) of the Act, 29 U.S.C. § 153(d) (1982), gives the General Counsel "final authority . . . in respect of the investigation of charges and issuance of complaints under Section 10 of this title [29 U.S.C. § 160], and in respect of the prosecution of such complaints before the Board . . . ."[2] This Court has held that the General

---

[2] Section 3(d) provides, in pertinent part:

> The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than

Counsel's decision to issue a complaint is unreviewable. *Vaca v. Sipes*, 386 U.S. 171, 182 (1967).

Unfair labor practice charges brought before the NLRB generally are settled in one of three ways: (1) informally before the issuance of complaint; (2) informally after the issuance of complaint; or (3) formally with issuance of the complaint. *See generally NLRB Case Handling Manual* (CCH) ¶¶ 1460-1480, 1640.[3] The settlement at issue here is in category (2).

The informal settlement before complaint issues raises no question as to reviewability. The General Counsel's decision to settle unfair labor practice charges and *not* to issue a complaint falls squarely within the discretionary authority upheld in *Vaca v. Sipes.*

The formal settlement provided for in the NLRB Rules and Regulations provides for a written stipulation which contemplates the issuance of an order by the Board. Section 10(f) of the Act, 29 U.S.C. § 160(f) (1982), provides for judicial review only of "a final order of the Board . . . ."[4] The formal settlement is, therefore, subject to judicial review.

---

trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10 of this title [29 U.S.C. § 160], and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

[3] A fourth means of settlement is the "Non-Board Settlement" wherein the General Counsel approves a charging party's request to withdraw its charges. *See id.* ¶ 1420. This settlement device differs from the first three in that the General Counsel is not party to the settlement agreement, and the provision therefore is not relevant to this case.

[4] Section 10(f) provides, in pertinent part:

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals.

The informal settlement after complaint has issued, such as the settlement at issue in this case, is of the same character as the informal settlement before issuance of complaint. The prosecution of a complaint, once it is issued, includes the authority to withdraw it prior to the opening of a hearing before an Administrative Law Judge pursuant to an informal settlement agreement between the General Counsel and the charged party. *Jackman v. NLRB*, 784 F.2d 759, 764 (6th Cir. 1986); *Local 282, Int'l Brotherhood of Teamsters v. NLRB*, 339 F.2d 795, 799 (2d Cir. 1964).

The NLRB's thorough discussion[5] of the conflicts on this issue among the courts of appeals provides a clear analysis of the state of the existing law, and the Chamber supports the Board's arguments. The decision of the court of appeals in this case is in direct conflict with the clear language of Section 3(d) of the Act which specifically grants unreviewable authority to the General Counsel, not only with respect to the issuance of complaints, but also with respect to their prosecution.

This Court has recognized that an administrative agency, in exercising its discretionary authority expressly provided by statute, makes decisions involving a complicated balancing of factors that are peculiarly within the agency's expertise. *See Heckler v. Chaney*, 105 S. Ct. 1649, 1656 (1985).[6] In deciding whether to pursue the

---

[5] *See* Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit (filed October 10, 1986) and Reply Memorandum for the Petitioners (filed December 8, 1986) by the National Labor Relations Board and the General Counsel, National Labor Relations Board.

[6] The *Heckler* holding was based on Section 10(2) of the Administrative Procedure Act, which precludes judicial review of agency actions when the "action is committed to agency discretion by law." 5 U.S.C. § 701(a)(2) (1982). Section 3(d) of the National Labor Relations Act commits to the NLRB General Counsel the authority to make decisions on whether and how to prosecute unfair labor practice charges. A holding that the General Coun-

prosecution of an unfair labor practice complaint, the General Counsel weighs such factors as whether the complaint can be prosecuted successfully, the benefits to be gained from the substantial and timely relief provided by a settlement, and whether the public interest is better served by settlement. This is no different than the decision whether to issue a complaint in the first place, with respect to which the General Counsel weighs not only the merits of the charge, but agency policies and priorities and the allocation of agency resources. Just as the initial decision on issuance of the complaint is not judicially reviewable, the language of Section 3(d) clearly precludes judicial review of the decision not to pursue prosecution.

The fact that a complaint has been issued does not terminate the prosecutorial function of the General Counsel. *Jackman*, 784 F.2d at 764 ("The issuance of a complaint is merely one of several pretrial discretionary non-reviewable evaluations and/or actions undertaken by General Counsel prior to the commencement of the actual hearing before the administrative law judge."). *See also Banta v. NLRB*, 626 F.2d 354, 356 (4th Cir. 1980) (jurisdiction to review General Counsel's prosecutorial decisions does not depend upon whether or not a complaint has issued.)

The issuance of a complaint does not alter the prosecutorial function of the General Counsel with respect to the withdrawal of that complaint, at least prior to the commencement of a hearing, as was the case here.[7] The

s's exercise of informal settlement authority is subject to judicial review would be contrary to the ruling in *Heckler* and thus would have implications for other administrative agencies in the exercise of their discretionary authority.

[7] Once a hearing has commenced, Board regulations permit a charging party to state on the hearing record its objections to any settlement entered into at that time. Board Rules and Regulations § 101.9(d)(1).

General Counsel evaluates and acts throughout the prosecution of the matter based on a consideration of the factors discussed above. The decision to enter into an informal settlement before the commencement of a hearing and not to prosecute further is no different—simply because it is made after the issuance of a complaint—than the initial decision to issue that complaint.

The informal settlement with the charged party to resolve the charges of the unfair labor practice complaint is an agreement entered into by the General Counsel and the charged party.[8] The charged party agrees to undertake certain actions to correct the unfair labor practices and the General Counsel agrees to withdraw the complaint, *i.e.*, to suspend further prosecution. The General Counsel is not, however, without recourse if the agreed to actions are not undertaken by the charged party. If the charged party fails to comply with the terms of the settlement agreement, the General Counsel may revoke the

[8] The General Counsel provides a procedure which permits a charging party to appeal to the General Counsel in Washington a determination on behalf of the General Counsel by an NLRB Regional Director to dismiss an unfair labor practice charge for lack of prosecutorial merit. *NLRB Case Handling Manual* (CCH) ¶ 1224, at § 10122.4. This appeal procedure is not required by the statute and has been established by the General Counsel to provide review before a charge is finally dismissed, a determination which the statute and this Court have made clear is unreviewable. No hearing, evidentiary or otherwise, is provided by the General Counsel to the charging party who appeals the dismissal of a charge and there is no claim in this case that any such hearing is required.

A charging party whose charge is resolved by an informal settlement pursuant to which a complaint is withdrawn is in a substantially better position than the unsuccessful charging party whose charge is dismissed, *i.e.*, substantial relief is provided by the settlement. The General Counsel affords the charging party a right to air its objections to the settlement through the same appeal procedure. It would be ironic if the charging party whose charge is to be settled were afforded greater rights, *i.e.*, an evidentiary hearing, than the charging party whose charge is dismissed altogether.

settlement and reinstitute the prosecution of the complaint. The informal settlement is an *agreement* to refrain from further prosecution in exchange for immediate substantial relief from the charged party. It is not an unconditional release from the charges of unlawful acts that the charging party has brought through its charge to the attention of the General Counsel.

The evaluation of the proposed terms of settlement, the weighing of the benefits of settlement versus proceeding to hearing, the decision to settle and to withdraw the complaint and the act of reinitiating the complaint if the terms of settlement are not met are all aspects of the prosecution of unfair labor practice charges by the General Counsel. The language of Section 3(d) grants the General Counsel unreviewable authority to act in all those aspects.

The prosecutorial authority granted to the General Counsel in Section 3(d) has been characterized as "vast and unreviewable." *Jackman*, 784 F.2d at 763 (citing comments of Senator Taft, 2 NLRB, *Legislative History of the Labor Management Relations Act of 1947* at 1623 (1948)). The intent and purpose underlying the Act clearly support the concept of the General Counsel's having final and independent authority to dispose of complaints through informal settlements.

II. THE EFFECT OF SUBJECTING PROSECUTORIAL DECISIONS OF THE GENERAL COUNSEL TO JUDICIAL REVIEW WOULD BE DISCOURAGEMENT OF SETTLEMENT AND PROLONGATION OF THE RESOLUTION OF LABOR DISPUTES.

Congress wisely provided for the possibility of final resolution by the General Counsel of the merits of an unfair labor practice charge. As noted above, the General Counsel has the authority to resolve such a charge by a decision to issue or not issue a complaint, by the decision to pursue prosecution or enter into an informal

settlement, and by the decision prior to the commencement of a hearing to withdraw the complaint pursuant to such an informal settlement. It is this final and independent authority of the General Counsel, coupled with the safeguards within the Office of the General Counsel that have promoted the prompt[9] and fair resolution of the thousands of unfair labor practice charges that are filed with the NLRB each year.

When charges are filed, the General Counsel investigates to determine whether to dismiss those charges or issue a complaint. A meritorious case for purposes of Section 3(d) is one which, absent settlement, the General Counsel is prepared to prosecute. The General Counsel settles approximately 95% of all meritorious cases and of the settlements reached, the vast majority—98% in fiscal year 1983[10]—are informal settlements. The settlement of such a high percentage of cases "permit[s] the Board to concentrate its quasi-judicial activities on other matters, thereby enhancing its overall efficient administration." *Jackman*, 784 F.2d at 764.

The facts of the present case demonstrate the degree to which a dispute can be prolonged and resolution delayed when the General Counsel is prevented from exercising final authority with respect to informal settlements. The result is uncertainty and disruption of the normal operation of an employer's business.

---

[9] Current NLRB reports indicate that determinations by the General Counsel with respect to whether a complaint should issue are made in a median time of 45 days. NLRB General Counsel's Report Summarizing Operations in Fiscal 1986, *reprinted in* Daily Labor Report (BNA) at D-2 (February 27, 1987).

[10] Fiscal year 1983 is the most recent year for which statistics are available. In that year, the NLRB settled a total of 10,632 cases. Of the 3,931 cases that were settled after the issuance of a complaint and before the commencement of a hearing, nearly 97%, or 3,803, resulted in *informal* settlements. 48 NLRB Ann. Rep. 183-185 (1983).

The original charges in this case were filed by Local 23 in August 1984, challenging the representational status of another union, the Steelworkers. The Regional Director acted on the case expeditiously, issuing complaints against the company and the Steelworkers in early September. In November, additional complaints were issued because of a change in ownership of the company. A hearing was scheduled for December. In early December, the Regional Director reached an informal settlement with the companies and the Steelworkers, and in late January 1985, the General Counsel, responding to an appeal from Local 23, refused to invalidate that settlement. The charges of unfair labor practices were disposed of by the General Counsel through the instant settlement in just over five months.

This case then moved into the court system by way of a petition for review to the court of appeals. As a result, the matter has been pending for more than two years. The employees of the Mars Shop 'N Save Store have been unrepresented during that time, because Local 23's appeal has had the effect of delaying recognition of any union. The potential for abuse of this process, if judicial review were available to the charging party in every post-complaint informal settlement agreement, is obvious. The guarantee of the right to a hearing would be susceptible to use for tactical advantage by one party or another: by a union to thwart or delay representation rights being accorded to a rival union or by an employer to postpone an obligation to bargain with a union seeking to establish its representational status through the Board's election process.

In the interests of sound and efficient administration of the statute, the General Counsel must have the freedom to exercise Section 3(d) authority to finally resolve these cases when a fair and just settlement has been reached. The agency serves the public interest, and that interest is served by expeditious resolution of disputes

with an avoidance of prolonged litigation whenever possible. The holding of the court of appeals in this case gives dominance to private theoretical interest of the charging party, thereby undermining the public policy favoring such expeditious resolution.

Unfair labor practice charges are brought by employers as well as by unions and individuals, and on occasion it might be to the tactical advantage of an employer to delay the settlement of a dispute by prolonging the process of judicial review. The right to the evidentiary hearing sought by the charging party here would have the potential for abuse by any charging party. A ruling by this Court that the General Counsel has nonreviewable prosecutorial authority to enter into informal settlements and withdraw complaints pursuant to those settlements is in the best interest of unions and employees as well as employers, because it will ensure the timely, final resolution of unfair labor practice charges. An affirmance of the ruling of the court of appeals would discourage settlements and expand opportunities for charging parties through procedural appeals to prolong and delay the peaceful and final resolution of labor disputes. Such a result is not in the best interest of labor or management and is inconsistent with the sound administration of the Act.

CONCLUSION

For the reasons stated in the foregoing, the Chamber of Commerce of the United States urges reversal of the court of appeals.

Respectfully submitted,

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
PAULA J. CONNELLY

NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

JOHN S. IRVING
Counsel of Record
GLENN SUMMERS
DEANNA R. DUBY

KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 879-5000

Counsel for the Amicus Curiae
Chamber of Commerce of the United States

PETITIONER'S

BRIEF

(5)

No. 86-594

In the Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD AND
ROSEMARY M. COLLYER, GENERAL COUNSEL,
NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 23, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2117

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ERIC G. MOSKOWITZ
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTIONS PRESENTED

1. Whether the withdrawal of an unfair labor practice complaint by the General Counsel of the National Labor Relations Board pursuant to an informal settlement agreement entered into prior to the commencement of a hearing on the complaint constitutes agency action subject to judicial review.

2. Whether, assuming the General Counsel's action is subject to judicial review, the General Counsel must hold an evidentiary hearing whenever the party who filed the unfair labor practice charge objects to the settlement and requests such a hearing.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-594

NATIONAL LABOR RELATIONS BOARD AND
ROSEMARY M. COLLYER, GENERAL COUNSEL,
NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 23, AFL-CIO

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 788 F.2d 178. The decisions of the regional director of the National Labor Relations Board and the General Counsel of the National Labor Relations Board rejecting respondent's objections to the withdrawal of the complaints (Pet. App. 14a-18a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 19a) was entered on May 15, 1986. A petition for rehearing was denied on June 13, 1986 (Pet. App.

20a-21a). On August 22, 1986, Justice Brennan extended the time for filing a petition for a writ of certiorari to and including October 11, 1986. The petition was filed on October 10, 1986, and was granted on January 12, 1987. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. III) 151 *et seq.*, the Administrative Procedure Act, 5 U.S.C. (& Supp. III) 551 *et seq.*, and the Board's Rules and Regulations and Statements of Procedure, 29 C.F.R. 101.1 *et seq.*, are set forth in the addendum to this brief.

STATEMENT

1. The National Labor Relations Act provides that "[i]t shall be an unfair labor practice" for an employer or labor organization to engage in conduct that infringes in specified ways upon the rights guaranteed employees under the Act (see 29 U.S.C. 158). The Act confers upon the National Labor Relations Board (NLRB) the authority "to prevent any person from engaging in any unfair labor practice * * * affecting commerce" (29 U.S.C. 160(a)). It states that the Board's General Counsel "shall have final authority, on behalf of the Board, in respect of the investigation of [unfair labor practice] charges and issuance of complaints * * *, and in respect of the prosecution of such complaints before the Board" (29 U.S.C. 153(d)), and it sets forth in general terms the procedures to be followed by the Board in determining whether an employer or labor organization has engaged in an unfair labor practice (29

U.S.C. 160(b) and (c)). The Board has promulgated detailed regulations containing the procedural rules applicable to the adjudication of an unfair labor practice charge (29 C.F.R. 102.9-102.59).[1]

An unfair labor practice case is initiated by the filing of a charge with the regional director of the NLRB for the region in which the alleged unfair labor practice occurred. The charge must be submitted in writing and under oath, must identify the charging party and the person against whom the charge is made, and must contain a statement of the facts relating to the alleged unfair labor practice. The regional director then conducts an investigation of the charge, obtaining evidence from both the charging party and the person against whom the charge was filed. If the investigation indicates that the charge lacks merit, the charge may be withdrawn by the charging party or dismissed by the regional director. 29 C.F.R. 101.2, 101.4-101.6, 102.9-102.12.[2]

When the regional director concludes that the charge may have merit, he normally affords an opportunity for the negotiation of an informal settlement agreement. A settlement at this stage of the proceedings does not require the entry of a Board order or court decree. It consists of a commitment by the charged party to take the agreed-upon remedial action; the case is closed upon compliance with

---

[1] The NLRB has also adopted a statement of procedure describing the process that it follows in adjudicating unfair labor practice cases (29 C.F.R. 101.2-101.16).

[2] The charging party may obtain review by the General Counsel of the regional director's decision to dismiss a charge. 29 C.F.R. 101.6, 102.19.

the terms of the settlement. See 29 C.F.R. 101.7.[3] The concurrence of the charging party is not a prerequisite for an informal settlement, but the charging party generally is consulted in connection with the proposed settlement and may contest the regional director's decision to approve the settlement by appealing to the General Counsel. 29 C.F.R. 101.7, 102.19.

If a settlement cannot be reached in a case that the regional director has found to be meritorious, the regional director issues a complaint. The charged party must file an answer and is entitled to a hearing before an administrative law judge (ALJ). After the hearing, the ALJ makes a recommended decision, which is subject to review by the Board; the Board's determination is in turn subject to judicial review. 29 U.S.C. 160(b)-(f); 29 C.F.R. 101.10-101.15, 102.20-102.50.

An unfair labor practice charge may, however, be settled either informally or formally after the filing of the complaint and prior to the commencement of the hearing. The Board's regulations provide that a complaint "may be withdrawn before the hearing by the regional director on his own motion." 29 C.F.R. 102.18; see *Olympia Fields Osteopathic Medical Center*, 278 N.L.R.B. No. 119 (Feb. 28, 1986). The regional director may withdraw the complaint pursuant to an informal settlement under which the charged party promises to provide agreed-upon relief. A charging party that objects to the terms of such an informal settlement may present its objec-

[3] In the event the charged party fails to comply with an informal settlement agreement, the General Counsel, through the regional director, may set aside the agreement and institute formal complaint proceedings. 29 C.F.R. 101.7, 101.9(e)(2).

tions to the regional director and may appeal to the General Counsel if the regional director rejects the objections and accepts the settlement. 29 C.F.R. 101.7, 101.9(b) and (c), 102.19.[4]

Alternatively, the charged party and the regional director may enter into a pre-hearing formal settlement. A formal settlement consists of the entry of a remedial order by the Board and, ordinarily, the charged party's consent to entry of an enforcement order by the appropriate court of appeals. See *NLRB Casehandling Manual* § 10168(10) (Mar. 1983); *Mor Food N' Fun*, 282 N.L.R.B. No. 176, at 10 (Feb. 18, 1987). A settlement of this type is subject to review and approval by the Board; a charging party that objects to the terms of a formal settlement may present its objections to the Board. 29 C.F.R. 101.9(b), 101.9(c)(2).

After the commencement of the hearing before the administrative law judge, the parties retain the authority to enter into either an informal or a formal settlement. The withdrawal of a complaint pursuant to an informal settlement must be approved by the ALJ; a formal settlement must be approved by the Board. 29 C.F.R. 101.9(d)(1). If the charging party objects to an informal settlement, the ALJ must provide an "opportunity to state on the record or in writing its reasons for opposing the settlement" (*ibid.*). Any party may seek leave to appeal to the Board the ALJ's approval or disapproval of an informal settlement (29 C.F.R. 101.9(d)(2)).

[4] In the event the charged party fails to comply with the informal settlement, the General Counsel may reinstate the unfair labor practice complaint. 29 C.F.R. 101.9(e)(2).

2. In August 1984, respondent filed with the Board's Pittsburgh Regional Office various unfair labor practice charges against Charley Brothers, Inc., the owner and operator of a grocery store in Mars, Pennsylvania, and the United Steelworkers of America and Local 14744 of that union. Respondent alleged that Charley Brothers had entered into a collective bargaining agreement with the United Steelworkers at a time when the union did not represent an uncoerced majority of Charley Brothers' employees. It also asserted that Charley Brothers had contributed both financial support and other forms of assistance to the union. Pet. App. 2a-3a; A.R. 1, 3.[5]

The regional director investigated the charges and issued complaints against both Charley Brothers and the United Steelworkers. The complaint against Charley Brothers alleged that the company had engaged in a variety of unlawful conduct that interfered with respondent's efforts to organize its employees and had assisted the United Steelworkers' organizational efforts, all of which culminated in Charley Brothers' recognition of the United Steelworkers as the exclusive representative of its employees. Pet. App. 3a-4a; A.R. 8-15. The complaint against the United Steelworkers alleged that the union had unlawfully accepted assistance and recognition from Charley Brothers, bargained for and executed the collective bargaining agreement at a time when it did not enjoy majority support among the employees, and unlawfully accepted dues deducted

[5] "A.R." refers to the administrative record filed in the court of appeals. We have consecutively numbered the pages of the record and our citations correspond to those page numbers.

from employees' wages under that agreement. Pet. App. 4a; A.R. 16-22. The regional director sought orders requiring Charley Brothers to withdraw recognition of the United Steelworkers and cease giving effect to the collective bargaining agreement until the union was certified by the NLRB as the representative of the store's employees. Pet. App. 4a-5a; A.R. 13, 21.

On September 24, 1984, Vic's Markets, Inc., acquired from Charley Brothers the Mars, Pennsylvania, grocery store that was the subject of the complaints. Respondent filed charges against Vic's Markets similar to those it had previously filed against Charley Brothers as well as new charges against the United Steelworkers, and the regional director issued complaints against Vic's Markets and the United Steelworkers incorporating the charges in the prior complaints. The four complaints were consolidated and a hearing before an administrative law judge was scheduled for December 4, 1984. Pet. App. 5a-6a; A.R. 4-7, 38-47, 60-61.

The regional director, Charley Brothers, Vic's Markets, and the United Steelworkers reached an informal settlement prior to commencement of the hearing on the complaints. Under the proposed settlement agreements, Charley Brothers and Vic's Markets agreed that they would not assist the United Steelworkers' organizing efforts or interrogate employees concerning their union sympathies; would not recognize the United Steelworkers or give effect to the Steelworkers' contract unless that union was selected by a majority of the employees in an election conducted by the Board; and would not in any other manner restrain or coerce employees in the exercise of the rights guaranteed by Section 7 of the Act, 29

U.S.C. 157. The employers also agreed to reimburse employees for the dues deducted from employees' wages pursuant to the contractual checkoff provisions and to post for sixty days a notice reciting the terms of the settlement. A.R. 74-86.

The proposed settlement with the United Steelworkers provided that the union would not accept any assistance from the employers, give effect to the existing collective bargaining agreement, act as the bargaining representative of the companies' employees or enter into future collective bargaining agreements unless it was selected as the employees' bargaining representative in an election conducted by the Board, or restrain or coerce employees in any other manner in the exercise of their rights under Section 7 of the Act. The union further agreed to mail to employees a notice that set forth the terms of the settlement agreement. A.R. 74-77. In exchange for these commitments, the regional director agreed to withdraw the unfair labor practice complaints. The agreements expressly provided that the employers and the Steelworkers did not admit that they had violated the Act (*id.* at 74, 78, 82).

On November 28, 1984, the regional director mailed the proposed informal settlement agreements to respondent and informed respondent of his intent to approve the agreements "inasmuch as it is my opinion that the proposed Settlement Agreements fully remedy any violative conduct alleged in your charges" (A.R. 73). The regional director advised respondent of its right to file objections to the proposed settlements (*ibid.*).

Respondent objected to the proposed settlements on six separate grounds. It asserted that it had not been " 'afforded full opportunity to dispose of the cases

by amicable adjustment' "; that the sixty-day period for posting the notice was " 'of insufficient duration to dissipate the effect of the unfair labor practices and * * * permit a free representation election' "; that, because the settlement agreements did not bar employees from engaging in union activity on behalf of the United Steelworkers during the sixty-day notice period, respondent should have been provided with " 'countervailing special access remedies' " to enable respondent to conduct organizational activities at the store; that the agreements were deficient because they did not provide for formal Board orders and consent decrees; that the charged parties should have been required to admit that they had violated the Act; and that the notices to be posted to provide information to employees were ambiguous (Pet. App. 6a-7a).

On December 12, 1984, the regional director advised respondent that he had approved the settlement agreements and withdrawn the complaints. The regional director explained that he had modified the notice directed to employees in response to respondent's claim that the notice was ambiguous; he concluded that respondent's objections to the settlements were otherwise "without merit." Pet. App. 16a-18a. The regional director found that respondent "had ample opportunity to reach a non-Board adjustment if it so desired" and that formal settlements were not appropriate under the circumstances of the case (*id.* at 17a). With respect to respondent's claim that the 60-day period for posting of the notice was too short, the regional director observed that 60 days "is the period of time historically used * * * to correct unlawful conduct like that alleged in the Complaints and is the posting period the Board normally would order upon a finding of a violation" (*ibid.*).

The regional director rejected respondent's assertion that the settlement agreements would give the United Steelworkers an advantage in gaining the right to represent the employees, noting that the employers were barred "from granting assistance or support [to any union] and from denying [respondent] access while granting access to the Steelworkers" (Pet. App. 17a). He stated that if these restrictions were violated "additional charges may be filed and a determination will be made after all the facts have been gathered" (*ibid.*). Finally, the regional director explained that the provisions of the settlement agreements providing that the charged parties did not admit liability were included pursuant to "agency practice * * * in order to promote settlement" (*id.* at 18a).

Respondent appealed the regional director's determination to the General Counsel; the General Counsel denied the appeal (Pet. App. 14a-15a).[6] The General Counsel found that the informal settlement agreements adequately remedied the violations charged in the complaint "substantially for the reasons set forth in the Regional Director's letter of December 12, 1984" (*id.* at 14a). She also rejected respondent's assertion that the regional director was required to hold a hearing regarding respondent's objections to the settlement agreements. Noting that the Board's rules and regulations make no provision for a hearing on objections to a settlement and that "the evidence indicates that [the Board's] procedures were

[6] In its appeal to the General Counsel, respondent did not raise its contentions that the 60-day posting period was too short and that the agreements were deficient because they did not bar the company's employees from engaging in union organizing activities (A.R. 115-119).

properly followed," the General Counsel concluded that "insufficient basis exists to invalidate the settlement agreement on those grounds" (*id.* at 14a-15a).

3. Respondent filed a petition for review in the court of appeals seeking to invalidate the settlement agreements. The Board and the General Counsel argued that the petition should be dismissed because the General Counsel's decision to withdraw the complaints and approve the settlements was an act of prosecutorial discretion by the General Counsel and not a "final order of the Board" within the meaning of Section 10(f) of the Act, 29 U.S.C. 160(f), and therefore was not subject to judicial review. The court of appeals, however, followed its earlier decision in *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527 (3d Cir. 1966), holding that it had jurisdiction to review the General Counsel's action and that the General Counsel erred by denying respondent's request for an evidentiary hearing concerning its objections to the settlement agreements (Pet. App. 1a-13a).

The court of appeals had held in *Leeds & Northrup* that the General Counsel's withdrawal of a complaint pursuant to an informal settlement was subject to judicial review under Section 10(f) of the Act and the judicial review provisions of the Administrative Procedure Act (357 F.2d at 531). The court observed that the Board's decision to approve a formal settlement agreement is subject to judicial review and stated that "[t]he absence of a formal order of the Board" does not preclude review of the General Counsel's decision to withdraw a complaint (*ibid.*). Stating that "[a]bsent judicial review, substantial rights of both the Company and its employees * * * are adversely affected," the court added that "[t]o propose

that United States Courts of Appeal are powerless, in a jurisdictional sense, to review quasi-judicial administrative action, either because rules and regulations, or policy, do not provide an adequate avenue of review up to the door of the court, or because of the absence of precise Congressional articulation for such review, poses inadequacy and injustice which Congress would never intend" (*id.* at 531-532). The court therefore found that "once a complaint issues the statutory scheme contemplates Board action. Anything less, such as informal actions of its agents in dismissing such complaint over the objections of the charging party, is arbitrary and capricious" (*id.* at 533).

After finding jurisdiction to review the General Counsel's action, the *Leeds & Northrup* court held that "once a complaint has issued, the charging party is entitled to an evidentiary hearing upon its objections to the proposed settlement agreement, be it formal or informal" (357 F.2d at 533). The court stated that the issuance of the complaint triggers "an adjudicatory phase of the administrative process * * * necessitating appropriate avenues of review, both administrative and judicial" (*id.* at 535); it concluded that an evidentiary hearing was an indispensable element of the required administrative review (*id.* at 535-536).

The court of appeals in the present case stated that it could "discern no principled distinction between *Leeds* and the instant case" (Pet. App. 11a). The court noted that respondent's objections to the settlement agreements raised no "material disputes of fact," but rather "involve[d] merely procedural matters or discretionary determinations concerning the remedy" and that "a *Leeds* evidentiary hearing

might therefore result in mere adherence to an empty formality" (*ibid.*). The court stated (*id.* at 12a (footnote omitted)) that it was required to follow its prior decision with respect to both the jurisdictional issue and the need for an evidentiary hearing but noted the existence of "ostensible precedents to the contrary" including this Court's decision in *Cuyahoga Valley Railway Co.* v. *United Transportation Union*, No. 84-1634 (Nov. 4, 1985) (per curiam). The court of appeals vacated the settlement agreements and remanded the case for an evidentiary hearing concerning respondent's objections.

SUMMARY OF ARGUMENT

I. The General Counsel of the National Labor Relations Board exercises "final authority, on behalf of the Board, in respect of the investigation of [unfair labor practice] charges and issuance of complaints * * * and in respect of the prosecution of such complaints before the Board" (29 U.S.C. 153(d)). It is well established that, as is the case with virtually every other official who exercises prosecutorial authority, the General Counsel's refusal to issue a complaint is not subject to judicial review. See *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975); *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967). We submit that the same rule applies when the General Counsel issues a complaint and then, prior to hearing, exercises her prosecutorial authority to withdraw the complaint and enter into an informal settlement.

First, judicial review of the General Counsel's decision is not available under the National Labor Relations Act. Section 10(f) of the Act, 29 U.S.C. 160(f), provides for judicial review of "a final order of the Board." The General Counsel's decision to

withdraw a complaint and enter into an informal settlement is not embodied in an order issued by the Board; it involves no action by the Board at all. And the legislative history of Section 3(d) of the Act, 29 U.S.C. 153(d), makes clear that Congress intended to separate completely the prosecutorial authority exercised by the General Counsel and the adjudicatory authority exercised by the Board. The General Counsel's settlement decision therefore may not be characterized as an action of the Board subject to judicial review under Section 10(f). Indeed, the legislative history shows that Congress recognized that the General Counsel's prosecutorial decisions would not be subject to judicial review at all.

The well settled principle that there is no judicial review of a decision by the General Counsel not to issue a complaint, even when that decision is part of an informal settlement, supports the conclusion that the withdrawal of a complaint in favor of an informal settlement is similarly unreviewable. Both kinds of decisions turn upon the General Counsel's evaluation of very similar considerations: the strength of the evidence of an unfair labor practice, the seriousness of the alleged offense, the willingness of the charged party to settle, the terms of the settlement, and the government resources available for prosecution of the complaint. Indeed, this Court in a similar context concluded that "[a] necessary adjunct of [the power to issue an enforcement citation] is the authority to withdraw a citation and enter into settlement discussions" (*Cuyahoga Valley Railway Co.* v. *United Transportation Union*, No. 84-1634 (Nov. 4, 1985) (per curiam), slip op. 4).

Moreover, the availability of judicial review would defeat the overriding policy in favor of amicable set-

tlements of unfair labor practice proceedings. A charged party has an incentive to settle prior to hearing when it can thereby ensure a final resolution of the matter at minimal risk and cost. The charged party is likely to have much less interest in settlement if it will nonetheless have to bear not only the costs of a hearing and appeals to the Board and the courts, but also the risk of a less favorable outcome after it has agreed to a compromise. Permitting the charging party to obtain judicial review of the General Counsel's action would therefore provide a strong disincentive to settlement.

Second, the General Counsel's informal settlement decisions are not subject to judicial review under the Administrative Procedure Act. The APA provides that judicial review is not available when review is precluded by statute (5 U.S.C. 701(a)(1)). Although the National Labor Relations Act does not by its terms preclude judicial review of the General Counsel's decisions, the express reference in the statute to the General Counsel's "final authority" over prosecutorial matters and the specific recognition by Congress that the General Counsel's decisions would not be reviewable in court provide clear and convincing evidence that Congress intended to preclude judicial review.

Judicial review of the General Counsel's informal settlement decisions is not available under the APA for the additional reason that a decision to enter into an informal settlement prior to hearing is "committed to [the General Counsel's] discretion by law" (5 U.S.C. 701(a)(2)). The Court held in *Heckler* v. *Chaney*, 470 U.S. 821 (1985), that "an agency's decision not to take enforcement action" is presumptively immune from judicial review; the presump-

tion may be rebutted where "the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers" (470 U.S. at 832-833 (footnote omitted)). Because a decision to exercise prosecutorial discretion by withdrawing a complaint and entering into an informal settlement involves the same considerations as a decision not to take enforcement action in the first place, it should be subject to the same presumption of unreviewability. The language and legislative history of the National Labor Relations Act indicate that Congress intended to leave both types of decisions to the unfettered discretion of the General Counsel, and the presumption against judicial review therefore applies in this case.

II. Even if judicial review were appropriate here, the court below plainly erred in holding that in this and every other case the General Counsel must hold an evidentiary hearing to consider the charging party's objections to an informal settlement. Nothing in the National Labor Relations Act or the Administrative Procedure Act justifies such a procedural requirement, the sole effect of which would be to force the General Counsel to litigate more cases on the merits. Here, where respondent's objections to the settlement raised no factual dispute, there is no justification for burdening the settlement process with an unnecessary procedural requirement.

ARGUMENT

I. THE GENERAL COUNSEL'S DECISION TO ENTER INTO AN INFORMAL SETTLEMENT AND WITHDRAW A COMPLAINT PRIOR TO HEARING IS NOT SUBJECT TO JUDICIAL REVIEW

The withdrawal of an unfair labor practice complaint by the General Counsel of the National Labor Relations Board prior to hearing is an act of prosecutorial discretion by the official with express and exclusive statutory authority to prosecute such complaints. It involves no adjudicatory (or other) action by the administrative law judge or the Board, from which the General Counsel was expressly made independent. And while the private complainant—the charging party—has certain specified rights in an unfair labor practice proceeding, the charging party is not the prosecutor, and its rights do not include deciding whether or not to file a complaint or whether or not to withdraw a complaint prior to hearing.

Section 3(d) of the National Labor Relations Act, 29 U.S.C. 153(d), grants to the General Counsel "final authority, on behalf of the Board, in respect of the investigation of [unfair labor practice] charges and issuance of complaints * * *, and in respect of the prosecution of such complaints before the Board." This Court has recognized that Section 3(d) endows the General Counsel with "unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); see also *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975). No statutory or logical distinction can be drawn between the General Counsel's refusal to issue a complaint and the situation presented here, in which the General Counsel issued a complaint but then exercised her prosecutorial authority to with-

draw the complaint, pursuant to an informal settlement, prior to the commencement of a hearing before an administrative law judge.[7]

A. The General Counsel's Decision Is Not Subject To Judicial Review Pursuant To The National Labor Relations Act

1. The National Labor Relations Act by its terms provides for judicial review of a limited category of administrative decisions. Section 10(f) of the Act, 29 U.S.C. 160(f), states that "[a]ny person aggrieved by a *final order of the Board* granting or denying in whole or in part the relief sought may obtain a review of such order in [the appropriate] United States court of appeals" (emphasis added). The starting point in interpreting this provision is, of course, its plain language. *United States* v. *James*, No. 85-434 (July 2, 1986), slip op. 6-7; *American Tobacco Co.* v. *Patterson*, 456 U.S. 63, 68 (1982). Section 10(f) by its terms permits judicial review only when "the Board" has issued an order. The General Counsel's decision to withdraw a complaint and enter into an informal settlement is not embodied in an order issued by the Board; indeed, the decision involves no action by the Board at all. Because of

[7] We emphasize that this case concerns the reviewability of a decision to enter into an informal settlement and withdraw a complaint prior to hearing. Once the hearing has begun, the Board's regulations require the General Counsel to obtain the approval of the ALJ before withdrawing the complaint, and the charged party may present to the ALJ its objections to the settlement. The regulations permit the charging party to seek Board review of the ALJ's determination, and the Board's action, like any other final action of the Board, is subject to judicial review pursuant to 29 U.S.C. 160(f). See 29 C.F.R. 101.9(b), 101.9(c)(2), 101.9(d).

the absence of a "final order of the Board," there is no basis for judicial review under Section 10(f).[8]

The structure and legislative history of the National Labor Relations Act do not evidence the "clearly expressed legislative intention to the contrary" necessary to justify an interpretation of Section 10(f) inconsistent with its plain language. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); see also *United States* v. *James*, slip op. 8; *Rubin* v. *United States*, 449 U.S. 424, 430 (1981). To the contrary, they confirm that the General Counsel's decision to withdraw a complaint is not a "final order of the Board" but a prosecutorial determination that, by express congressional design, involves no action whatsoever by the Board. They also demonstrate that Congress recognized that the General Counsel's prosecutorial decisions would not be subject to judicial review.

The National Labor Relations Act originally authorized the Board to prosecute as well as adjudicate all unfair labor practice charges (Act of July 5, 1935, ch. 372, § 10, 49 Stat. 453). Congress amended the Act in 1947 by adding Section 3(d), which created the Office of the General Counsel and endowed the General Counsel with "final authority, on behalf of the Board" regarding both the "issuance of com-

[8] This Court has previously interpreted Section 10(f) in accordance with its plain language. In *American Federation of Labor* v. *NLRB*, 308 U.S. 401 (1940), the Court held that the certification of the bargaining representative under Section 9(c) of the Act, 29 U.S.C. 159(c), was not reviewable under Section 10(f) unless and until it became the basis for an unfair labor practice order issued under Section 10(b) and (c). The Court found that "[t]he statute on its face * * * indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting [or declining to prohibit] unfair labor practices, a purpose and a construction which its legislative history confirms" (308 U.S. at 409).

plaints" and "the prosecution of such complaints before the Board."

Section 3(d) was enacted in response to criticism of the original Act's concentration of both prosecutorial and adjudicatory authority in the Board. As Representative Hartley, one of the principal sponsors of the 1947 amendments, observed, "[t]he National Labor Relations Board has been investigator, prosecutor, jury, and judge all rolled into one." 93 Cong. Rec. 3423-3424 (1947); *Leg. Hist.* 613.[9] Congress decided to separate these functions by transforming the Board into a "quasi-judicial" body (93 Cong. Rec. 3424 (1947) (remarks of Rep. Hartley); *Leg. Hist.* 613). It transferred the Board's prosecutorial authority to a General Counsel "appointed by the President, by and with the advice and consent of the Senate" (29 U.S.C. 153(d)). Congress emphasized that the General Counsel would have "the final authority to act in the name of, but independently of any direction, control, or review by, the Board * * * in respect of the prosecution of such complaints before the Board" (H.R. Conf. Rep. 510, 80th Cong., 1st Sess. 37 (1947); *Leg. Hist.* 541).[10]

---

[9] "*Leg. Hist.*" refers to Senate Comm. on Labor and Public Welfare, 93d Cong., 2d Sess., *Legislative History of the Labor Management Relations Act, 1947* (Comm. Print 1974).

[10] The bill passed by the House of Representatives had "created a new independent agency under an administrator to be appointed by the President (subject to Senate confirmation) to perform the investigating and prosecuting functions" (93 Cong. Rec. 6442 (1947) (remarks of Sen. Taft); *Leg. Hist.* 1538). The final version of the statute accomplished the "separation of functions within the framework of the existing agency by establishing a new statutory office, that is, a general counsel of the Board" to exercise prosecutorial authority independent of the Board (*ibid.*).

The opponents of Section 3(d) attacked the independence of the General Counsel, criticizing the proposed amendment on the ground that it concentrated too much authority in one government official. Senator Pepper observed that "one man is made the arbiter of every case that comes before the attention of the Board. The Board has no authority to decide whether a case should be brought, or whether a complaint should be acted upon. That exclusive power is given to one lawyer" (93 Cong. Rec. 6513 (1947); *Leg. Hist.* 1588). Senator Murray specifically addressed the reviewability of the General Counsel's decisions, stating that "[o]ne person will determine when complaints shall issue in all cases, how investigations shall be conducted, how cases shall be tried, which cases shall be enforced. Much of this action will not be subject to appeal, either to the Board or the courts" (93 Cong. Rec. 6496 (1947); *Leg. Hist.* 1567).

Senator Taft, a principal sponsor of the legislation, acknowledged that Section 3(d) "places a tremendous amount of unreviewable power in the hands of a single official" (93 Cong. Rec. 6859 (1947); *Leg. Hist.* 1623). He responded to this criticism by observing that the decisions to be entrusted to the General Counsel were not in practice reviewed by the Board under the original Act, but instead had been delegated to "an anonymous committee of subordinate employees" (*ibid.*).[11] Senator Taft explained (*ibid.*):

> What the conference amendment does is simply to transfer this "vast and unreviewable power" from this anonymous little group to a statutory

---

[11] See Findling, *NLRB Procedures: Effects of the Administrative Procedure Act*, 33 A.B.A.J. 14, 17 (Jan. 1947).

> officer responsible to the President and to the Congress. So far as having unfettered discretion is concerned he, of course, must respect the rules of decision of the Board and of the courts. In this respect his function is like that of the Attorney General of the United States or a State attorney general.

The legislative history thus makes clear that Congress intentionally separated the Board's prosecutorial authority from its adjudicatory authority and transferred that prosecutorial authority to the newly-created General Counsel, whom Congress intended to be entirely independent of the Board when she is performing her prosecutorial functions. Indeed, Congress created the Office of the General Counsel precisely because it wanted to insulate this prosecutorial authority from control by the Board. In view of this congressional design, any exercise by the General Counsel of her prosecutorial authority is, by definition, wholly independent of the Board. Such action therefore cannot constitute a "final order of *the Board*" within the meaning of Section 10(f) (emphasis added).

Moreover, Congress recognized that the prosecutorial authority conferred on the General Counsel would not be subject to further review, administrative or judicial. At the time of the adoption of Section 3(d), the courts had already concluded that at least some of the Board's prosecutorial decisions were not subject to judicial review. *Lincourt* v. *NLRB*, 170 F.2d 306, 307 (1st Cir. 1948) (decision not to issue complaint); S. Rep. 752, 79th Cong., 1st Sess. 53 (1945); compare *Jacobsen* v. *NLRB*, 120 F.2d 96, 100 (3d Cir. 1941) (finding that judicial review was proper because, in addition to issuing a complaint,

the Board in that case had "held hearings, granted relief to the petitioning employees, and then [had withdrawn] that relief" in a "final order dismissing the complaint"). Section 3(d) transferred this unreviewable authority to a prosecutor—the General Counsel. The general principle that prosecutorial decisions are not subject to judicial review (see pages 35-36, 37-39, *infra*), the fact noted above that this principle had been found to apply to the Board's prosecutorial decisions, the specific references in the legislative history to the unreviewability of the General Counsel's decisions, and the express denomination of the General Counsel's authority as "final," strongly support the conclusion that Congress recognized that there would be no judicial review of the General Counsel's exercise of the prosecutorial authority conferred by Section 3(d).[12]

---

[12] In *International Ladies' Garment Workers Union (ILGWU)* v. *NLRB*, 501 F.2d 823, 828-831 (D.C. Cir. 1974), the court of appeals reached a different conclusion regarding the legislative history of Section 3(d). It asserted that the statement in Section 3(d) that the General Counsel exercises her authority "on behalf of the Board" indicates that Congress intended "that the actions of the General Counsel in dealing with unfair labor practices were to constitute Board action" (501 F.2d at 829-830 (footnote omitted)). But, as Representative Hartley explained, the sole purpose of the statement in Section 3(d) that the General Counsel acts "on behalf of the Board" was to avoid the need to create a separate administrative agency to house the General Counsel: "[t]he reference to the Board [in Section 3(d)] was necessary because, in order to have [the General Counsel] independent of the Board, we had to use the term 'Board.' Otherwise, we would have had to set up a completely independent agency. * * * He acts on behalf of the Board but completely independent of the Board." 93 Cong. Rec. 6383 (1947); *Leg. Hist.* 883. The legislative history elsewhere further confirms that Congress's use of this term is irrelevant to the reviewability in

The courts of appeals have repeatedly recognized the distinction between prosecutorial actions taken by the General Counsel and adjudicative and other actions taken by the Board, refusing to construe a decision by the General Counsel not to issue an unfair labor practice complaint as an order of the Board subject to review under Section 10(f). *Lincourt* v. *NLRB*, 170 F.2d at 307; *National Maritime Union* v. *NLRB*, 423 F.2d 625, 626 (2d Cir. 1970); *Terminal Freight Co-Operative Ass'n* v. *NLRB*, 447 F.2d 1099, 1101-1102 (3d Cir. 1971), cert. denied, 409 U.S. 1063 (1972); *Hernandez* v. *NLRB*, 505 F.2d 119, 120 (5th Cir. 1974); *Echols* v. *NLRB*, 525 F.2d 288 (6th Cir. 1975); *Pacific Southwest Airlines* v. *NLRB*, 611 F.2d 1309, 1311 (9th Cir. 1980); see also *Vaca* v. *Sipes*, 386 U.S. at 182. Sometimes the General Counsel's decision not to issue a complaint

---

court of the General Counsel's decisions. The House version of the bill, which would have transferred the Board's prosecutorial autority to a separate agency (see note 10, *supra*), contained no provision for judicial review of the prosecutor's actions. See H.R. 3020, 80th Cong., 1st Sess. (1947); *Leg. Hist.* 31-98. Congress's decision to reject the structural approach in the House bill, and create a General Counsel within the same agency as the Board for administrative purposes, in no way indicates that Congress intended the entirely unrelated consequence of subjecting the General Counsel's decisions to judicial review as if they were decisions by the Board.

If the *ILGWU* court were right, moreover, any decision of the General Counsel that finally disposes of a case would be subject to judicial review under Section 10(f). That result would be inconsistent with the well settled rule, discussed in the text, that decisions of the General Counsel declining to issue a complaint are *not* subject to judicial review. The *ILGWU* court's interpretation of the legislative history of Section 3(d) simply cannot be reconciled with that fundamental principle.

is the result of an informal settlement agreement with the charged party, but even where the record shows this to be the case, the decision not to file a complaint is not reviewable under Section 10(f). *Terminal Freight Co-Operative Ass'n* v. *NLRB*, *supra*.

The General Counsel's decision to withdraw a complaint prior to hearing pursuant to an informal settlement is indistinguishable from her refusal to issue a complaint in the first place because the matter has been settled. First, neither action is a "final order of the Board"; to the contrary, each is an exercise of the prosecutorial authority conferred upon the General Counsel by Section 3(d). Second, both actions turn on assessments of the same factors, which include the strength of the evidence of an unfair labor practice, the seriousness of the offense and the likelihood of its repetition, the willingness of the charged party to settle, the adequacy of the remedy available under the proposed settlement, and the government resources available for prosecution of the complaint. See, *e.g.*, *Roselle Shoe Corp.*, 135 N.L.R.B. 472, 475 (1962), enforced *sub nom. Textile Workers Union of America* v. *NLRB*, 315 F.2d 41 (D.C. Cir. 1963); see also *Container Systems Corp.* v. *NLRB*, 521 F.2d 1166, 1171-1172 (2d Cir. 1975); *Farmers Co-Operative Gin Ass'n*, 168 N.L.R.B. 367, 368 (1967). These determinations are often made before a complaint has issued, but that is not always the case. Circumstances may change or events come to light after a complaint has issued that make it advisable to terminate the proceeding or accept a settlement. Indeed, the charged party may not be willing to settle until a complaint has issued.[13]

---

[13] A few courts have suggested that where the General Counsel "withdraws a complaint on the basis of an informal

As Judge Friendly observed, the General Counsel's authority "'in respect of the prosecution of * * * complaints before the Board' must include the power to determine whether a complaint can be successfully prosecuted and, if he thinks not, to drop it; by the same token he has power to consider and decide

---

settlement agreement which provides for an adjustment of the conflicting interests of the private parties and thus partially or wholly remedies the underlying labor dispute," her prosecutorial role "assume[s] essentially adjudicatory attributes." *ILGWU*, 501 F.2d at 831; see also *International Association of Machinists* v. *Lubbers*, 681 F.2d 598, 604 (9th Cir. 1982), cert. denied, 459 U.S. 1201 (1983) (holding that General Counsel's decision to withdraw a complaint on the ground that the available evidence would not support further prosecution is not subject to judicial review but suggesting that withdrawal of a complaint in favor of a settlement may be subject to judicial review because a settlement "involves the restructuring of the charging party's 'private rights'"); *George Banta Co.* v. *NLRB*, 626 F.2d 354, 356-357 (4th Cir. 1980), cert. denied, 449 U.S. 1080 (1981) (same).

The suggested distinction is wholly unsupportable. Withdrawal of a complaint for any reason effectively resolves conflicting claims of statutory entitlement. A withdrawal for lack of merit resolves against the charging party its claim that it is entitled to protection under the Act. Withdrawal in favor of settlement represents a judgment that, in view of all of the circumstances, continued litigation of the case is not appropriate. For example, it may serve the policies of the Act to accept a settlement with a relatively lenient remedy when the evidence of a violation is weak; on the other hand, the General Counsel might be able to obtain an agreement to provide full relief when the evidence on the merits is stronger. Indeed, the decision to withdraw a complaint without any settlement presumably has a greater adverse impact on the charging party's interests than the decision to accept a settlement that grants some, but not all, of the relief sought by the charging party. It makes no sense to require judicial review at the behest of the charging party in the latter context while barring any review in the former.

whether the public interest would be better served by settlement." *Local 282, International Brotherhood of Teamsters* v. *NLRB*, 339 F.2d 795, 799 (2d Cir. 1964) (citation omitted); accord, *Jackman* v. *NLRB*, 784 F.2d 759, 763-764 (6th Cir. 1986). Judge Friendly's observation is just as pertinent after a complaint has been filed as before.

This Court's decision in *Cuyahoga Valley Railway Co.* v. *United Transportation Union*, No. 84-1634 (Nov. 4, 1985) (per curiam), directly supports the view that the General Counsel's decision to enter into an informal settlement and withdraw a complaint falls within her prosecutorial discretion and therefore cannot be characterized as Board action. That case involved the enforcement scheme established by the Occupational Safety and Health Act, 29 U.S.C. (& Supp. III) 651 *et seq.* The Secretary of Labor is empowered by that statute to inspect working conditions and issue citations to employers that he finds to be in violation of the Act; if the employer contests the validity of the citation and the Secretary decides to seek enforcement, he issues a complaint and prosecutes the case before an administrative law judge and the Occupational Safety and Health Review Commission. 29 U.S.C. (& Supp. III) 658-661.

The question presented in *Cuyahoga Valley Railway Co.* was whether the Commission could review the Secretary's decision to withdraw a citation and complaint. The Sixth Circuit ruled that the Commission could review that decision; this Court summarily reversed. It found that "[a] necessary adjunct of [the Secretary's power to issue citations] is the authority to withdraw a citation and enter into settlement discussions" (slip op. 4). Observing that "the Commission itself was created to avoid giving

the Secretary both prosecutorial and adjudicatory powers," the Court concluded that permitting the Commission to review the Secretary's decision to settle and withdraw a citation "would * * * allow the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend" (*id.* at 4-5). In view of the similar division of authority between the General Counsel and the NLRB, the General Counsel's decision to withdraw a complaint and enter into an informal settlement agreement plainly falls within the General Counsel's discretion under Section 3(d).[14]

2. Permitting a charging party to obtain judicial review of the General Counsel's decision to withdraw a complaint would upset Congress's deliberate assignment of roles in the adjudication of unfair labor practice charges and would defeat the overriding policy favoring settlements. In enacting the Act, Congress "made a careful adjustment of the individual and administrative interests throughout the course of litigation over a labor dispute" (*Auto Workers* v. *Scofield*, 382 U.S. 205, 209 (1965)). An unfair labor practice proceeding may not be initiated sua

[14] The *ILGWU* court found a "substantial similarity between a 'formal' and an 'informal' settlement" in that "[e]ach finally ends an unfair labor practice proceeding by 'granting or denying in whole or in part the relief sought.'" *ILGWU*, 501 F.2d at 830; see also *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527, 531 (3d Cir. 1966). But a formal settlement requires a "final order of the Board" and is therefore subject to judicial review under the plain language of Section 10(f). An informal settlement involves no Board or ALJ action. In addition, a charged party's failure to comply with an informal settlement results in the reinstatement of the complaint; a formal settlement is enforceable against the charged party in court.

sponte by either the General Counsel or the Board, but instead is begun by a charge filed by a private party. Once the charge is filed, however, control passes to the General Counsel, who has "final authority" with respect to the issuance of a formal complaint and the prosecution of that complaint before the Board. 29 U.S.C. 153(d), 160; *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138-139 (1975); *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 264-266 (1940).[15]

Allowing charging parties and the courts to second-guess the General Counsel's prosecutorial decisions would make it much more difficult for the General Counsel to resolve matters by informal settlement. Amicable settlements are "the life-blood of the administrative process" (Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies, Final Report*, S. Doc. 8, 77th Cong., 1st Sess. 35 (1941)). The National Labor Relations Board "has from the very beginning encouraged compromises and settlements" (*Wallace Corp.* v. *NLRB*, 323 U.S. 248, 253-254 (1944) (footnote omitted)). Informal settlement

[15] The charging party may participate in the administrative proceeding, but the proceeding remains within the control of the General Counsel. See, *e.g.*, *Piasecki Aircraft Corp.* v. *NLRB*, 280 F.2d 575, 578-588 (3d Cir. 1960), cert. denied, 364 U.S. 933 (1961) (charging party cannot enlarge the proceeding before the Board beyond the scope of the complaint issued by the General Counsel); cf. *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U.S. 261, 265 (1940) (observing that the charging party "does not become the actor in the proceeding"). Similarly, the charging party is afforded notice and an opportunity to comment on a settlement agreement, but its consent is not required for the consummation of the agreement. See 29 C.F.R. 101.7, 101.9, 102.19.

agreements of the type involved in this case "permit the Board to concentrate its quasi-judicial activities on other matters, thereby enhancing its overall efficient administration" (*Jackman* v. *NLRB*, 784 F.2d at 764). At present, the General Counsel settles approximately 92% of all meritorious cases.[16] Informal settlements following the issuance of a complaint constitute a significant number of those cases.[17]

The General Counsel's ability to secure informal settlements prior to hearing obviously depends upon whether she can assure a charged party that the settlement will resolve the matter and that the charged party will avoid both the costs of a hearing and appeals to the Board and the courts and the risk of a less favorable outcome. A charged party has little incentive to enter into a settlement that does not put the matter to rest. Permitting judicial review of informal settlements would therefore provide a strong disincentive to settlement and "obstruct expeditious Board dispositions without concomitant benefit to its decision-making process" (*NLRB* v. *Oil, Chemical & Atomic Workers International Union*, 476 F.2d 1031, 1036 (1st Cir. 1973)). Congress's desire to achieve the prompt and peaceful resolution of industrial labor disputes weighs strongly against judicial review in this context. Cf. *Cuyahoga Valley Railway*

---

[16] Office of the General Counsel, NLRB, *Summary of Operations for Fiscal Year 1986*, at 5 (Feb. 25, 1987).

[17] In fiscal year 1983, the most recent year for which statistics are available, the NLRB settled a total of 10,632 cases. Of those, 3,931 were settled after the issuance of a complaint and before the commencement of a hearing before an administrative law judge; almost all of those settlements—3,803—were informal settlements of the sort at issue in this case. 48 NLRB Ann. Rep. 183-185 (1983).

Co. v. *United Transportation Union*, slip op. 4 (observing that permitting administrative review of the Secretary of Labor's decision to withdraw a citation pursuant to an informal settlement "would discourage the Secretary from seeking voluntary settlements with employers in violation of the Act, thus unduly hampering the enforcement of the Act").[18]

---

[18] In *Auto Workers* v. *Scofield*, 382 U.S. 205 (1965), the Court held that a successful charging party may intervene when the charged party seeks review in a court of appeals of a Board order granting relief; it also concluded that a charged party may intervene in the judicial review proceeding commenced by a charging party seeking review of the Board's dismissal of a complaint following a hearing on the merits. *Scofield* supports our contention that the General Counsel's prosecutorial decisions are not reviewable under Section 10(f). The Court in *Scofield* framed its inquiry in terms of congressional intent: it concluded that Congress would not have intended to bar these parties from intervening in judicial review proceedings. See 382 U.S. at 216-217, 222. Here, by contrast, congressional intent points strongly against judicial review of the General Counsel's decisions.

Moreover, *Scofield* addressed situations in which it was clear the Board's decisions would be examined on judicial review; the question was whether additional parties should be permitted to participate in those review proceedings. The Court found that considerations of efficiency and fairness weighed in favor of intervention (382 U.S. at 212-214, 220), specifically observing that "[t]he rights typically secured to an intervenor in a reviewing court * * * are not productive of delay nor do they cause complications in the appellate courts" (*id.* at 215). The Court in *Scofield* was not called upon to consider the effect upon the administrative process of an *expansion* of the right of judicial review. We submit that the practical considerations cited by the Court in permitting intervention weigh against subjecting the General Counsel's prosecutorial decisions to judicial review: the availability of such review will interfere with the General Counsel's exer-

B. The General Counsel's Decision Is Not Subject To Judicial Review Under The Administrative Procedure Act

The Third Circuit in *Leeds & Northrup Co.* v. *NLRB*, 357 F.2d 527 (3d Cir. 1966), also invoked the Administrative Procedure Act to justify its conclusion that the General Counsel's decision to withdraw a complaint was subject to its review (see 357 F.2d at 531, 532). As a threshold matter, the *Leeds & Northrup* court and the court below plainly erred in suggesting that the APA authorizes review in a court of appeals: even if the charging party did have a right to judicial review under the APA, that statute is not a grant of jurisdiction (see 5 U.S.C. 703; *Califano* v. *Sanders*, 430 U.S. 99, 104-107 (1977)). In the absence of a statute conferring jurisdiction for direct review of an agency decision on a court of appeals, the cause of action created by the APA may only be asserted in the appropriate district court pursuant to its general federal question jurisdiction (see 28 U.S.C. 1331). The Court may, however, wish to consider the APA issue despite the fact that respondent commenced this action in the court of appeals, because this Court could order the action transferred to the appropriate district court pursuant to 28 U.S.C. 1631 if it concludes that the APA does authorize judicial review. We therefore address the reviewability under the APA of the General Counsel's decision.

This Court observed in *Heckler* v. *Chaney*, 470 U.S. 821 (1985), that "before any review at all may

---

cise of her prosecutorial discretion and diminish the likelihood of settlement, thereby upsetting the administrative plan crafted by Congress.

be had [under the judicial review provisions of the APA], a party must first clear the hurdle of [5 U.S.C.] § 701(a)" (470 U.S. at 828). That provision states in pertinent part that judicial review is available under the APA "except to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law" (5 U.S.C. 701(a)). Judicial review of the General Counsel's decision to enter into an informal settlement and withdraw a complaint is precluded by both of these statutory exclusions. First, the language, structure, and legislative history of the National Labor Relations Act demonstrate that Congress intended to preclude review of the General Counsel's decisions. Second, judicial review is not available because the decision to enter into an informal settlement prior to hearing is committed to the unfettered discretion of the General Counsel.

1. A "statute[] preclude[s] judicial review" (5 U.S.C. 701(a)(1)) when the statute and legislative history demonstrate that "Congress intended to preclude judicial review of certain decisions." *Heckler* v. *Chaney*, 470 U.S. at 828; see also *Block* v. *Community Nutrition Institute*, 467 U.S. 340 (1984); *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979); *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). Although the National Labor Relations Act does not in so many words declare that there shall be no judicial review of the General Counsel's prosecutorial decisions, the language and structure of the statute, together with the legislative history, provide the required clear and convincing evidence that Congress intended to preclude judicial review. Cf. *Block* v. *Community Nutrition Institute*,

467 U.S. at 346-348, 350-352; *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. at 462.[19]

First, the National Labor Relations Act authorizes court of appeals review of "a final order of the Board" (29 U.S.C. 160(f)). The specification of review in this instance and the absence of any provision for judicial review of the decisions of the General Counsel evidence congressional intent that the General Counsel's decisions are not to be subject to judicial review. Cf. *Block* v. *Community Nutrition Institute*, 467 U.S. at 346-347; *American Federation of Labor* v. *NLRB*, 308 U.S. at 409-412 (holding that the Board's certification of a bargaining representative was not subject to judicial review because Congress intended to limit judicial review to Board orders relating to unfair labor practice proceedings).

Second, Section 3(d) expressly confers upon the General Counsel "*final authority*, on behalf of the

[19] In the brief for the petitioner in *Heckler* v. *Chaney*, *supra*, the Solicitor General stated (Pet. Br. at 19 n.10) that Section 3(d) was intended by Congress to bar further administrative, rather than judicial, review of the General Counsel's decisions and that judicial review was not available solely because prosecutorial decisions are committed to the unfettered discretion of the General Counsel. The Solicitor General now believes that statement was unwarranted and that judicial review of the General Counsel's prosecutorial decisions is not available both because the statute precludes judicial review and because those decisions are committed to the General Counsel's discretion. The statement in the brief in *Chaney* is not supported by the structure of the Act or the legislative history of Section 3(d) and did not represent the view of the National Labor Relations Board, which was not consulted in connection with the preparation of the brief in *Chaney*. The proper construction of Section 3(d) was not at issue in *Chaney* and the Court's opinion does not indicate that its decision was based upon any determination with respect to that question.

Board, * * * in respect of the prosecution of such complaints before the Board" (emphasis added). The reference to "final authority" indicates that Congress intended to insulate the General Counsel's decisions from any further review, administrative or judicial. Cf. *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. at 455-456 (finding judicial review precluded by statute in part because "[t]he statute is silent on what factors should guide the [administrative] decision").

The legislative history of the National Labor Relations Act confirms that conclusion.[20] Congress enacted Section 3(d) in order to separate the Board's prosecutorial authority from its adjudicatory authority, and it understood that the general principle that prosecutorial decisions are not subject to judicial review would apply when the General Counsel exercised her authority under Section 3(d). Thus, in response to criticism regarding the unlimited discretion entrusted to the General Counsel, Senator Taft analogized the General Counsel's authority to the prosecutorial authority exercised by the Attorney General (see page 22, *supra*). A decision by the Attorney General to dismiss an action in favor of an informal settlement is of course not subject to judicial review in the absence of a statute specifically providing for such review (see *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1868)), and Congress

[20] Indeed, even though the APA was passed only one year before the creation of the Office of the General Counsel and figured in the debates over some aspects of the General Counsel's role (see, *e.g.*, 93 Cong. Rec. 6455 (1947); *Leg. Hist.* 1559), Congress nowhere indicated that it intended to subject the General Counsel's decisions to judicial review under that statute.

plainly intended that the same rule would apply to prosecutorial decisions made by the General Counsel. *Jackman* v. *NLRB*, 784 F.2d at 763-764; see pages 21-23, *supra*.[21]

Finally, permitting judicial review of the General Counsel's determination would "disrupt this complex and delicate administrative scheme" (*Block* v. *Community Nutrition Institute*, 467 U.S. at 348). Because a charged party would be reluctant to enter into a settlement where judicial review would be available at the behest of the charging party, it would be much more difficult for the General Counsel to resolve matters by informal settlement (see pages 29-31, *supra*).

2. Judicial review of the General Counsel's prosecutorial decisions is precluded for a second, independent reason. The APA bars review of "agency action * * * committed to agency discretion by law" (5 U.S.C. 701(a)(2)); this provision applies if "the statute is drawn so that a court would have no meaningful standard against which to judge the agency's

[21] The Court stated in *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975), that the analogy between an unfair labor practice proceeding and a criminal prosecution was "far from perfect" (421 U.S. at 156 n.22), but the only limitation upon the General Counsel's prosecutorial discretion cited by the Court was that the General Counsel may issue a complaint only after a private party has filed an unfair labor practice charge. The Court also noted that the Board's rules and regulations accord a charging party the status of "party" to the unfair labor practice proceeding once a complaint issues, but the Board's rules and regulations expressly limit the charging party's participation (see note 26, *infra*) and do not affect the General Counsel's prosecutorial discretion either to refuse to issue a complaint or to withdraw a complaint as part of an informal settlement prior to the hearing.

exercise of discretion" (*Heckler* v. *Chaney*, 470 U.S. at 830). The Court held in *Chaney* that "an agency's decision not to take enforcement action" is presumptively immune from judicial review; the presumption may be rebutted "where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers" (*id.* at 832-833 (footnote omitted)). The NLRB General Counsel's decision not to file an unfair labor practice complaint is a well established instance of such unreviewable prosecutorial discretion. See *id.* at 831, citing *Vaca* v. *Sipes*, 386 U.S. at 182. Her decision to withdraw a complaint prior to hearing pursuant to an informal settlement is a virtually indistinguishable exercise of prosecutorial discretion, equally unguided by the statute and equally unsuited to judicial review.

a. A decision to exercise prosecutorial discretion by withdrawing a complaint and entering into an informal settlement involves the same considerations that led this Court to conclude in *Chaney* that a decision not to take enforcement action is presumptively immune from judicial review. Settlement often becomes possible only after a complaint is filed because it takes the reality rather than the threat of a complaint to bring about a settlement. But in both situations the decisionmaker must consider "not only * * * whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed * * *, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all" (*Chaney*, 470 U.S. at 831). In determining whether to dismiss an enforcement proceeding in favor of an informal settlement, "[t]he agency is far

better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." *Id.* at 832; cf. *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *Action on Safety & Health* v. *FTC*, 498 F.2d 757, 761-762 (D.C. Cir. 1974).[22]

Moreover, in the absence of statutory standards, a court would have little basis for evaluating the correctness of the administrative decision to enter into an informal settlement. The problem was described by the three Justices who dissented in *Maryland* v. *United States*, 460 U.S. 1001 (1983), from summary affirmance of the district court's decision approving a consent decree in an antitrust action. The district court had acted pursuant to a statute that bars the entry of an antitrust consent decree unless the court first determines "that the entry of such judgment is in the public interest" (15 U.S.C. 16(e)). Justice Rehnquist stated that "[t]he question assigned to the district courts by the Act is a classic example of a question committed to the Executive" (460 U.S. at 1005). He continued (*id.* at 1006):

> The question whether to prosecute a lawsuit is a question of the execution of the laws, which is committed to the Executive by Art. II. There is no standard by which the benefits to the public from a "better" settlement of a lawsuit than the Justice Department has negotiated can be balanced against the risk of an adverse decision, the need for a speedy resolution of the case, the benefits obtained in the settlement, and the availability of the Department's resources for other cases. How is a court to decide whether a better settlement in a case involving one industry is more important to the public than the benefits that might be gained by immediately working on an antitrust problem in another industry? Finally, the decision requires an evaluation of an initial policy decision—whether the benefits that might be obtained in a lawsuit are worth the risks and costs—that is clearly for nonjudicial discretion.

[22] Like an agency's decision not to act, an informal settlement generally does not involve the exercise of an agency's "*coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect" (*Chaney*, 470 U.S. at 832 (emphasis in original)). If the agency chooses to exercise its coercive authority by proceeding with an enforcement action, "that action itself provides a focus for judicial review" (*ibid.*).

The Court relied in *Chaney* on essentially the same point: a court is not in a position to second-guess the prosecutor's judgment about the strength of his case, the importance of this case versus other uses of his resources, and whether the likely benefits exceed the risks and costs of a particular enforcement action. The decision of a presidentially appointed prosecutor, like the NLRB General Counsel, to enter into a settlement prior to the beginning of adjudicatory activity is surely, under *Chaney*, at least presumptively unreviewable absent a clear congressional directive to the contrary.

b. The presumption against judicial review of an agency decision to terminate an enforcement proceeding can be overcome only if Congress "has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion" (*Chaney*, 470 U.S. at 834). Nothing in the National Labor Relations Act indicates an intent to limit the General Counsel's prosecutorial discretion or sets forth stand-

ards to govern her exercise of that discretion. As we have discussed, the language and legislative history of the statute instead make clear that Congress intended to leave those decisions to the unfettered discretion of the General Counsel.

It is well settled that Section 3(d) grants the General Counsel "unreviewable discretion to refuse to institute an unfair labor practice complaint." *Vaca* v. *Sipes*, 386 U.S. at 182; see also *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. at 155. The courts of appeals have uniformly held that the Administrative Procedure Act does not authorize the district courts to review the General Counsel's refusal to issue a complaint. See, *e.g.*, *Associated Builders & Contractors, Inc.* v. *Irving*, 610 F.2d 1221, 1224-1226 (4th Cir. 1979), cert. denied, 446 U.S. 965 (1980); *International Association of Machinists* v. *Lubbers*, 681 F.2d 598, 602-603 (9th Cir. 1982); *Saez* v. *Goslee*, 463 F.2d 214, 215 (1st Cir.), cert. denied, 409 U.S. 1024 (1972); *Hourihan* v. *NLRB*, 201 F.2d 187, 188 (D.C. Cir. 1952).[23]

---

[23] In *Dunlop* v. *Bachowski, supra*, the Court held that a decision of the Secretary of Labor not to file suit to set aside an election for union office pursuant to Section 402(b) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 482(b), was subject to judicial review. The Court adopted the reasoning and conclusion of the court of appeals in that case that the Secretary's refusal to file was not "an unreviewable exercise of prosecutorial discretion" (421 U.S. at 567 n.7). It is noteworthy that the court of appeals had expressly distinguished the situation under the National Labor Relations Act on the ground that the LMRDA charges the Secretary with vindicating private as well as public rights. The court explained (*Bachowski* v. *Brennan*, 502 F.2d 79, 87 n.11 (3d Cir. 1974)):

> This case is, therefore, distinguishable from Vaca v. Sipes, 386 U.S. 171, 182-183 n.8, 87 S.Ct. 903, 913 17 L.Ed.2d 842 (1967), where the Court held that the General Counsel of the National Labor Relations Board has unreviewable discretion to refuse to institute an unfair labor practice complaint because, under § 10(c) of the National Labor Relations Act, "[t]he public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies."

The language of Section 3(d) and its legislative history make clear that the General Counsel's prosecutorial discretion does not terminate upon the issuance of the complaint, but extends to settlement decisions made in the course of prosecuting the complaint before the Board (see pages 19-22, *supra*). Indeed, as we have discussed, permitting the charging party to obtain judicial review of settlement decisions will upset the administrative plan crafted by Congress. Because the General Counsel's discretionary authority encompasses a decision whether to withdraw a complaint in favor of an informal settlement (see pages 25-28, *supra*), such decisions are not subject to judicial review under the APA.[24]

See also *Chaney*, 470 U.S. at 833 (distinguishing *Bachowski* on the ground that it "presents an example of statutory language which supplied sufficient standards to rebut the presumption of unreviewability").

[24] While there is jurisdiction in the district courts to review agency action that is "in excess of its delegated powers and contrary to a specific prohibition in the Act" (*Leedom* v. *Kyne*, 358 U.S. 184, 188-189 (1958)), there is no allegation here that the General Counsel's acceptance of the settlement was prohibited by the Act. Indeed, as the Ninth Circuit noted in *Baker* v. *International Alliance of Theatrical Stage Employees*, 691 F.2d 1291, 1296-1297 (1982), "it is difficult to imagine a situation where the refusal of the General Counsel to issue a complaint would violate an express statutory command of the Act * * *, because nothing in it requires the General Counsel to issue complaints upon the finding of a violation."

II. THE CHARGING PARTY IS NOT AUTOMATICALLY ENTITLED TO AN EVIDENTIARY HEARING

Even if it had been proper for the court of appeals to undertake review here, the court plainly erred in ruling (Pet. App. 11a-12a) that in this and every other case the General Counsel must hold an evidentiary hearing to consider the charging party's objections to an informal settlement. Respondent's objections to the informal settlement in this case did not depend on any disputed facts, and no purpose would be served by affording respondent an evidentiary hearing.[25]

Nothing in the National Labor Relations Act mandates an evidentiary hearing every time a charging party objects to a settlement. The Act grants the charged party a right to a hearing in an unfair labor practice proceeding, and the Board "in its discretion" may permit any other person, such as a charging party, to intervene and present testimony. 29 U.S.C. 160(b); *Amalgamated Utility Workers* v. *Consolidated Edison Co.* 309 U.S. at 264-265. The Board has exercised that discretion to permit a charging party to present evidence and cross-examine witnesses at the unfair labor practice hearing. See 29 C.F.R. 102.38. With respect to a settlement, however, the charging party is limited to the submission

[25] The question whether it is proper for a court of appeals to direct an evidentiary hearing is of general significance even though we contend that in this case the court should not have undertaken any review at all: courts of appeals plainly do have authority to review formal settlements (involving final Board orders), and the hearing issue may arise in that context as well. However, if this Court determines that the court of appeals lacked jurisdiction over this action, it need not address the question whether respondent was entitled to an evidentiary hearing.

of a written statement setting forth its objections to the settlement agreement. 29 C.F.R. 101.6, 101.9 (c)(1) and (2). Thus, neither the statute nor the Board's rules support the hearing requirement imposed by the court below.[26]

Nor does the Administrative Procedure Act mandate an evidentiary hearing in connection with a settlement. The portion of the APA concerning settlement procedures provides "all interested parties" with certain procedural rights in connection with settlements (5 U.S.C. 554(c)). The purpose of that provision, however, is to ensure "that informal means of settlement be made available, and not at all to broaden the category of those [persons] entitled to demand a hearing—an issue left for determination

[26] The Board's rules include a charging party within the definition of "party" (29 C.F.R. 102.8), but that same provision states that the definition does not "prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of his interest only." The Board has exercised the latter authority by declining to accord charging parties a right to an evidentiary hearing concerning their objections to a settlement. In the case of informal settlements entered into prior to the commencement of a hearing before an administrative law judge, charging parties may submit written statements to the regional director and obtain review of the regional director's decision by the General Counsel. 29 C.F.R. 101.6, 101.9(c), 102.19. If the informal settlement is reached after the hearing has begun, the charging party may submit a written statement to the ALJ or state on the record its objections to the settlement. It may seek review by the Board of the ALJ's decision to approve the settlement. 29 C.F.R. 101.9(d)(1) and (2). With respect to formal settlements, the charging party also may submit objections and, if the formal settlement is approved by the regional director and the General Counsel, the charging party may appeal to the Board. 29 C.F.R. 101.9(c)(2).

under the relevant substantive statutes" (*Local 282, International Brotherhood of Teamsters* v. *NLRB*, 339 F.2d at 801). The courts have consistently held that the APA does not direct an agency to hold an evidentary hearing; it merely specifies the procedure to be followed when a hearing is required by some other statute. *Colorado* v. *Veterans Administration*, 602 F.2d 926, 928 (10th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); *Sisselman* v. *Smith*, 432 F.2d 750, 754 (3d Cir. 1970); *Webster Groves Trust Co.* v. *Saxon*, 370 F.2d 381, 385-386 (8th Cir. 1966). Since the Act does not entitle a charging party to demand a hearing in connection with a settlement, the APA settlement procedures do not come into play. *Local 282, International Brotherhood of Teamsters* v. *NLRB*, 339 F.2d at 800; see also *NLRB* v. *Oil, Chemical & Atomic Workers International Union*, 476 F.2d at 1034-1035; *Concrete Materials of Georgia, Inc.* v. *NLRB*, 440 F.2d 61, 68 n.9 (5th Cir. 1971).

The Third Circuit's determination that a charging party is always entitled to an evidentiary hearing on its objections to a settlement agreement contravenes this Court's admonition that lower courts should not "engraft[] their own notions of proper procedures upon agencies entrusted with substantive functions by Congress" (*Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 525 (1978)). The Court explained (*id.* at 543-544 (citations omitted)) that:

> [a]bsent constitutional constraints or extremely compelling circumstances the "administrative agencies 'should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.'"

The hearing requirement imposed by the Third Circuit would, as a practical matter, force the General Counsel to litigate many more cases. Charged parties settle cases in order to resolve matters at minimal cost and risk. If, after agreeing to a settlement, a charged party must nevertheless face not only the delay and cost of a hearing but the risk of a worse result, many fewer charged parties will be willing to settle. The Board's rules permitting charging parties to file objections to informal settlements and requiring the General Counsel to issue a statement of reasons in the event the settlement agreement is approved properly accommodate the relevant interests, ensuring charging parties an opportunity to present their views while preserving settlement as a useful enforcement tool.

Indeed, the courts of appeals other than the Third Circuit are in essential agreement that an evidentiary hearing is not required in every case. All that is necessary is that the charging party be afforded an adequate opportunity to present its objections to the General Counsel and, where Board review is involved, to the Board. See *George Ryan Co.* v. *NLRB*, 609 F.2d 1249, 1252, 1253 (7th Cir. 1979); *Oshkosh Truck Corp.* v. *NLRB*, 530 F.2d 744, 748-749 (7th Cir. 1976); *ILGWU*, 501 F.2d at 832; *NLRB* v. *Oil, Chemical & Atomic Workers International Union*, 476 F.2d 1031, 1036 (1st Cir. 1973); *NLRB* v. *International Brotherhood of Electrical Workers, Local 357*, 445 F.2d 1015, 1016 (9th Cir. 1971); *Concrete Materials of Georgia, Inc.* v. *NLRB*, 440 F.2d at 68; *Local 282, International Brotherhood of Teamsters* v. *NLRB*, 339 F.2d at 798.[27]

---

[27] Some courts have also stated that the General Counsel or the Board must provide the charging party with a statement

Some courts have stated that an evidentiary hearing should be held where the charging party's objections raise a disputed issue of material fact. *George Ryan Co.* v. *NLRB*, 609 F.2d at 1253; *NLRB* v. *Oil, Chemical & Atomic Workers International Union*, 476 F.2d at 1036; *NLRB* v. *International Brotherhood of Electrical Workers, Local 357*, 445 F.2d at 1016, 1017-1018; *Concrete Materials of Georgia, Inc.* v. *NLRB*, 440 F.2d at 68; but see *Local 282, International Brotherhood of Teamsters* v. *NLRB*, 339 F.2d at 799-801 (charging party is never entitled to an evidentiary hearing on its objections to a settlement). The Court need not resolve that question in this case because respondent's objections raised no such factual issue.

The record shows that respondent was afforded a full opportunity to assert objections to the settlement agreements. Pursuant to the Board's regulations and statement of procedure, respondent's views were fully considered and addressed by the regional director and the General Counsel. The factors prompting the regional director and General Counsel to accept the settlements were clearly articulated and communicated to respondent. See Pet. App. 14a-18a. Respondent raised no claim of a factual dispute in objecting to the settlement. Its assertions related solely to the propriety of the General Counsel's discretionary determinations regarding the sufficiency of the relief provided by the settlement agreements. *Id.* at 11a; see pages 8-9, *supra*. Indeed, the court of appeals acknowledged that holding an evidentiary

of the reasons for the denial of its objections to the settlement. There is no claim here that the statements of reasons provided to respondent by the regional director and the General Counsel (see Pet. App. 14a-18a) were deficient in any way.

hearing in this case "might * * * result in mere adherence to an empty formality" (Pet. App. 11a). There simply is no justification for burdening the settlement process with an unnecessary procedural requirement—not justified by any statute or regulation—whose sole effect is likely to be the obstruction of voluntary settlements.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

LOUIS R. COHEN
Deputy Solicitor General

ANDREW J. PINCUS
Assistant to the Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

ERIC G. MOSKOWITZ
Attorney
National Labor Relations Board

APRIL 1987

ADDENDUM

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 3(d) of the National Labor Relations Act, 29 U.S.C. 153(d) provides:

> There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. * * *

2. Section 10 of the National Labor Relations Act, 29 U.S.C. 160, provides in pertinent part:

> (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.
>
> (b) Whenever it is charged that any person has engaged in or is engaging in any such un-

fair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * * Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. * * *

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of

employees with or without back pay, as will effectuate the policies of this subchapter * * *. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. * * *

* * * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter

a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

3. 5 U.S.C. 701(a) provides:

(a) This chapter applies, according to the provisions thereof, except to the extent that—
(1) statutes preclude judicial review; or
(2) agency action is committed to agency discretion by law.

4. Sections 101.6 through 101.9 of the Board's Statements of Procedure, Series 8, 29 C.F.R. 101.6-101.9, provide:

Sec. 101.6 *Dismissal of charges and appeals to general counsel.*—If the complainant refuses to withdraw the charge as recommended, the regional director dismisses the charge. The regional director thereupon informs the parties of his action, together with a simple statement of the grounds therefor, and the complainant of his right of appeal to the general counsel in Washington, D.C., within 10 days. If the complainant appeals to the general counsel, the entire file in the case is sent to Washington, D.C., where the case is fully reviewed by the general counsel with the assistance of his staff. Oral presentation of the appeal issues may be permitted a party on timely written request, in which event the other parties are notified and afforded a like opportunity at another appropriate time. Following such review, the general counsel may sustain the regional director's dismissal, stating

the grounds of his affirmance, or may direct the regional director to take further action.

Sec. 101.7 *Settlements.*—Before any complaint is issued or other formal action taken, the regional director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The regional office provides Board-prepared forms for such settlement agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the regional director, provide for an appeal to the general counsel, as described in § 101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the regional director. Proof of compliance is obtained by the regional director before the case is closed. If the respondent fails to perform his obligations under the informal agreement, the regional director may determine to institute formal proceedings.

Sec. 101.8 *Complaints.*—If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the regional director institutes formal action by issuance of a complaint and notice of hearing. In certain types of cases, involving novel and complex issues, the regional director, at the discretion of the general counsel, must submit the

case for advice from the general counsel before issuing a complaint. The complaint, which is served on all parties, sets forth the facts upon which the Board bases its jurisdiction and the facts relating to the alleged violations of law by the respondent. The respondent must file an answer to the complaint within 10 days of its receipt, setting forth a statement of its defense.

Sec. 101.9 *Settlement after issuance of complaint.*—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b) (1) After the issuance of a complaint, the agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, D.C. In such an agreement, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(2) In some cases, however, the regional director pursuant to his authority to withdraw the complaint before the hearing (§ 102.18 of this chapter), may conclude that an informal settlement agreement of the type described in § 101.7 is appropriate. Such an agreement is not subject to approval by the Board and does not provide for a Board order. It provides for the withdrawal of the complaint.

(c) (1) If after issuance of complaint but before opening of the hearing, the charging party will not join in a settlement tentatively agreed upon by the regional director, the respondent, and any other parties whose consent may be required, the regional director serves a copy of the proposed settlement agreement on the charging party with a brief written statement of the reasons for proposing its approval. Within 5 days after service of these documents, the charging party may file with the regional director a written statement of any objections to the proposed settlement. Such objections will be considered by the regional director in determining whether to approve the proposed settlement. If the settlement is approved by the regional director notwithstanding the objections, the charging party is so informed and provided a brief written statement of the reasons for the approval.

(2) If the settlement agreement approved by the regional director is a formal one, providing for the entry of a Board order, the settlement agreement together with the charging party's objections and the regional director's written statements, are submitted to Washington, D.C., where they are reviewed by the general counsel.

If the general counsel decides to approve the settlement agreement, he shall so inform the charging party and submit the agreement and accompanying documents to the Board, upon whose approval the settlement is contingent. Within 7 days after service of notice of submission of the settlement agreement to the [B]oard, the charging party may file with the Board in Washington, D.C., a further statement in support of his objections to the settlement agreement.

(3) If the settlement agreement approved by the regional director is an informal one, providing for the withdrawal of the complaint, the charging party may appeal the regional director's action to the general counsel, as provided in § 102.19 of this chapter.

(d) (1) If the settlement occurs after the opening of the hearing and before issuance of the administrative law judge's decision and there is an all-party informal settlement, the request for withdrawal of the complaint must be submitted to the administrative law judge for his approval. If the all-party settlement is a formal one, final approval must come from the Board. If any party will not join in the settlement agreed to by the other parties, the administrative law judge will give such party an opportunity to state on the record or in writing its reasons for opposing the settlement.

(2) If the administrative law judge decides to accept or reject the proposed settlement, any party aggrieved by such ruling may ask for leave to appeal to the Board as provided in § 102.26 of this chapter.

(e) (1) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition the court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board Order, the Board may petition the court for enforcement of its order, pursuant to section 10 of the National Labor Relations Act.

(2) In the event the respondent fails to comply with the terms of an informal settlement agreement, the regional director may set the agreement aside and institute further proceedings.

5. Section 102.18 of the Board's Rules and Regulations, Series 8, 29 C.F.R. 102.18, provides:

> Any such complaint may be withdrawn before the hearing by the regional director on his own motion.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1997 181483 40289

RESPONDENT'S

BRIEF

No. 86-594

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 23,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit**

BRIEF FOR THE RESPONDENT

GEORGE MURPHY
(Counsel of Record)
PETER FORD
1775 K Street, N.W.
Washington, D.C. 20006
(202) 223-3111

DAVID SILBERMAN
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006

Of Counsel:
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND RULES:

MISCELLANEOUS:

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-594

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Petitioners,

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 23,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT

The citation to the opinions below, statement of the basis of this Court's jurisdiction, and statutes and regulations involved in this case are fully set forth in the brief of petitioners and we therefore do not repeat them here.

STATEMENT OF THE CASE

Respondent Local 23, United Food and Commercial Workers is a labor union which represents employees of grocery stores in the Pittsburgh, Pennsylvania area. Like any labor organization, respondent seeks to organize the employees of as many competing employers as pos-

sible so as to establish labor standards that the organized employers can afford to pay without being placed at a competitive disadvantage.

In August, 1984, respondent filed unfair labor practice charge against Charley Brothers Co. ("the Company"), operator of a grocery store in Mars, Pennsylvania, alleging that the Company had violated §§ 8(a)(1), (2) and (3) of the National Labor Relations, as amended, 29 U.S.C. § 158(a)(1), (2), (3) ("NLRA" or "the Act") by: interfering with respondent's efforts to organize the Company's employees; assisting a rival union, Local 14744, United Steelworkers of America, in its organizing drive; and recognizing the rival union as the exclusive representative of those employees at a time when Local 14744 did not enjoy majority support within the bargaining unit. Respondent filed a separate charge against Local 14744 alleging that the local had violated § 8(b)(1)(A), (2), 29 U.S.C. § 158(b)(1)(A), (2), by virtue of the conduct described in the charges against the Company.

The General Counsel of the National Labor Relations Board ("NLRB" or "the Board") investigated the charges and found them meritorious. After failing to obtain an informal resolution of the matter, the General Counsel, acting through her Regional Director, on September 14, 1984 commenced a formal proceeding before the Board by filing complaints against the Company and Local 14744. Those complaints alleged, *inter alia*, that the Company had: denied respondent access to its facility for organizational purposes while granting access to Local 14744; informed employees of the Company that they could receive union representation only by selecting Local 14744 as their representative; interrogated employees concerning their activities on behalf of respondent and destroyed authorization cards secured by respondent; participated in soliciting authorization cards for Local

14744; recognized Local 14744 as the exclusive representative of the Company's employees and entered into a collective bargaining agreement with that local at a time when that union did not represent an uncoerced majority of the employees; and deducted dues for Local 14744 from all bargaining unit employees' pay regardless of whether the employees had authorized such deductions.[1]

A hearing on the complaints was scheduled for December 4, 1984. Six days before that hearing was scheduled to commence, the Regional Director wrote to counsel for respondent transmitting "a copy of the proposed Settlement Agreements entered into by the charged parties." Those agreements provided for informal settlement of the complaints, *viz.*, settlements not embodied in orders of the Board and hence not enforceable in the event of a breach. Under the settlements, the Company and Local 14744—without admitting to any of the allegations in the complaints—promised to cease violating the Act, to reimburse employees for the dues deducted from employees' wages pursuant to the contractual check-off provisions, and to post notice reciting the terms of the settlements.

In transmitting these settlement agreements to respondent, the Regional Director stated that he "intend[ed] to approve" the agreements as "it is my opinion that the proposed Settlement Agreements fully remedy any violative conduct." In accordance with § 101.9(c)(1) of the Board's Statement of Procedure, 29 C.F.R. § 101.9(c)(1), however, the Regional Director afforded

---

[1] After the complaint was issued, Vic's Markets, Inc., acquired the grocery store in question and continued to recognize Local 14744 and to deduct dues for that Local from all bargaining unit employees. Respondent filed an unfair labor charge against Vic's Markets on the basis of these actions; the General Counsel issued a complaint on those charges; and that complaint ultimately was settled in the same manner as the other complaints.

respondent a five-day period to submit written objections to the settlement agreements.

By letter dated December 6, 1984, respondent submitted its exceptions. Noting that the consequence of the settlements would be to permit Local 14744 to petition for a representation election—and thereby profit from its wrongs and the wrongs of the Company—respondent contended that the settlement agreements were inadequate to "restore[ ]" the "requisite laboratory conditions." In particular, respondent objected to: the nonadmissions clause in the settlement agreements on the ground that it would be used by the Company and Local 14744 in an ensuing representation campaign as a form of exoneration; the absence of formal and enforceable orders as part of the settlements; and the contents of the notice of the settlements that was to be posted. Respondent also objected to the settlements on the ground that respondent was not "afforded the opportunity to participate in the settlement negotiation process" to the extent required by the Board's rules. Respondent requested a hearing on its objections.[2]

Six days after respondent submitted its objection they were overruled by the Regional Director who made certain changes in the notice, but otherwise concluded that respondent's objections were "without merit." Pet. App. 17a. The Regional Director therefore approved the settlement agreements and withdrew the complaints.

On December 26, 1984, respondent appealed the Regional Director's action to the General Counsel, raising again the issues that had been presented to the Regional Director and again seeking a "hearing on its objections."

---

[2] Respondent also raised objections to the length of the posting period and to the absence of any special access remedies for respondent in the event of an immediate election campaign. Respondent did not pursue these objections within the administrative process, however.

By letter dated January 22, 1985 the General Counsel denied that appeal. The General Counsel stated that the exclusion of respondent from the settlement process did not provide a basis for overturning the settlement agreements. *Id.* 14a. And the General Counsel concluded that "insufficient evidence was presented to establish that the Regional Director abused his discretion in approving an informal settlement agreement with a nonadmission clause." *Id.* 15a.

Under the Board's rules, the action of the General Counsel in informally settling a case pending before the Board and withdrawing a complaint cannot be appealed to the Board for review. Accordingly, on February 26, 1985, respondent filed the instant petition for review in the United States Court of Appeals for the Third Circuit. The sole issue respondent raised in the court of appeals was respondent's entitlement to a hearing before the Board on the settlement objections.

On April 16, 1986, the court of appeals granted the petition for review and remanded the matter for "evidentiary hearing on Local 23's objections." Pet. App. 12a. The appellate court acted on the basis of its decision almost twenty years earlier in *Leeds & Northrup Co. v. NLRB*, 357 F.2d 527 (3d Cir. 1966), in which that court had concluded that under the NLRA "once a complaint issues the statutory scheme contemplates Board action," *id.* at 533, and therefore:

> if an amicable adjustment of a labor dispute cannot be brought about through informal negotiations with the consent of all the parties, after the issuance of a complaint, then such informal proceedings must be formalized for Board action within the statutory scheme, thereby creating a record for judicial review. [*Id.*]

On January 12, 1987, this Court granted the petition for a writ of certiorari to enable the Court to review the Third Circuit's decision in this matter.

ARGUMENT

Introduction and Summary

Congress, in enacting the Labor Management Relations Act of 1947, 61 Stat. 136 ("LMRA"), worked extensive revisions to the National Labor Relations Act of 1935, 49 Stat. 449. One of the most important of these was the creation of an office within the National Labor Relations Board of the "General Counsel of the Board." *See* § 3(d) of the National Labor Relations Act, as amended, 29 U.S.C. § 153(d).

The question presented by petitioners in this case is whether the action of the General Counsel in settling a case after the Board's formal adjudicative processes have been invoked "constitutes agency action subject to judicial review." Pet. Br. at 5. The answer to that question depends on whether Congress intended to vest the General Counsel with absolute and unreviewable authority to settle cases after a complaint has issued. The NLRB and its General Counsel, in their joint brief, argue that the answer to that question is "yes." As we proceed to show, the 1947 Congress had no such intent; rather the General Counsel is empowered to settle such cases *only with the Board's approval*, and the General Counsel's failure to obtain such approval before resolving a case pending before the Board is remediable through the judicial process.

In Part I we demonstrate that under the NLRA, once the Labor Board's formal adjudicatory process is initiated, the approval of the Board is required before an unfair labor practice complaint can be resolved by settlement. The NLRA's statutory language demonstrates that Congress established a system in which every case in which a complaint is issued will culminate in a "final order" of the Board which is subject to judicial review at the behest of any "person aggrieved" thereby, including the charging party whose rights are implicated by

the unfair labor practice proceeding. The General Counsel's role in this system is to decide whether to initiate the Board's processes by issuing a complaint, and, if a complaint is issued, to prosecute that complaint "before the Board." NLRA § 3(d), 29 U.S.C. § 153(d). Pp. 11-14 *infra*.

The legislative history of the LMRA confirms this conclusion. That history shows, as petitioners here acknowledge, that Congress intended to confer on the General Counsel those powers that prior to 1947, had been delegated by the NLRB to its staff. Although petitioners *assume* that the power to settle cases in which a complaint had been issued was one such power, petitioners are simply wrong: that power had not been delegated by the Board to the staff prior to 1947—but rather had been retained by the Board itself—and thus was not one of the powers transferred to the General Counsel by the enactment of the LMRA. Pp. 15-22 *infra*.

In Part II we demonstrate that the General Counsel's action in settling this case and withdrawing the complaint without Board approval is subject to judicial review under either § 10(f) of the NLRA, 29 U.S.C. § 160(f), or under § 704 of the Administrative Procedure Act, 5 U.S.C. § 704 ("APA"). Section 10(f) provides for judicial review of final orders "of the Board"; since, under the plain terms of § 3(d), the General Counsel acts "on behalf of the Board," it follows that her actions are reviewable under § 10(f) to the same extent that such actions would be reviewable if taken by the Board. Indeed any other conclusion would impute to the Congress that enacted the LMRA an intention to restrict judicial review by the transfer of authority to the General Counsel, whereas the legislative history of the LMRA contains no evidence of such an intent and contains affirmative expressions of Congress' desire to expand the judicial role within the statutory scheme. Pp. 25-28 *infra*.

If § 10(f) does not provide for judicial review of actions of the General Counsel "on behalf of the Board," APA § 704 would then be implicated for it creates a cause of action to review "final agency action for which there is no other adequate remedy in a court." Petitioners resist this conclusion by invoking APA § 701 which forecloses judicial review "to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." Neither of these exceptions is applicable here, however: nothing in the NLRA evidences an affirmative intention to foreclose review; and respondent's challenge to the procedures the General Counsel followed in settling the case (specifically, to the General Counsel's failure to obtain NLRB approval of the settlement) does not raise a question as to which "there is no law to apply." Indeed, even if respondent were seeking judicial review of the substance of the settlement agreement this still would not be a case in which the agency action would be "committed to agency discretion by law"; in a variety of contexts courts are accustomed to reviewing settlement agreements—including settlement agreements entered into under the NLRA—and draw upon a rich body of law in so doing. Pp. 29-33 *infra*.

Finally, in Part III we show that the court below properly remanded this case to the Board for an evidentiary hearing on respondent's objections to the settlements. The propriety of the remand to the Board cannot be gainsaid in light of our showing that NLRB approval is required of post-complaint settlements. And whatever the merits of the lower court's holding that an evidentary hearing is always required on settlement objections, such a hearing was properly ordered in this case because the very reason the General Counsel overruled respondent's objections was that "insufficient evidence was presented to establish that the Regional Director abused his discretion in approving an informal settlement agreement with a non-admission clause." Pp. 33-34 *infra*.

I. Under The National Labor Relations Act, Once The Labor Board's Formal, Adjudicatory Process Is Initiated, The Approval Of The Board Is Required Before An Unfair Labor Practice Case Can Be Resolved By Settlement.

A. It is common ground in this case that in enacting the LMRA, Congress conferred on the General Counsel "unreviewable discretion to refuse to initiate an unfair labor practice complaint." *Vaca v. Sipes*, 386 U.S. 171, 182 (1967). The threshold question posed here is whether the General Counsel likewise enjoys unreviewable discretion to resolve by settlement a case that has been "initiated [by] an unfair labor practice complaint" thereby invoking the Board's formal adjudicatory process.

That question is one of statutory construction. In a variety of contexts, the law allows an initiating party broad discretion with respect to the commencement of an action, but gives the tribunal before whom the action is brought some say over even a consensual resolution of the action. For example, under the Federal Rules of Criminal Procedure, the United States Attorneys enjoy unfettered discretion in deciding whether to initiate a criminal prosecution, but once an information or indictment is filed, court approval s required of a plea bargain agreement providing for the dismissal of some charges, *see* F.R. Crim.P. 11(e), or even of the dismissal of an indictment, *see id.* Rule 48(a). Similarly, under the Federal Rules of Civil Procedure, while private plaintiffs are free to decide whether to file a class action, such a suit "shall not be dismissed or compromised without the approval of the court." F.R.Civ.P. 23(e).

Perhaps most instructive of all is this Court's decision in *Ford Motor Co. v. Labor Board*, 305 U.S. 364 (1939). In that case the Board, after filing a petition in the court of appeals to enforce an order the Agency had issued, sought to dismiss the petition; the Board ar-

gued that because it enjoys unfettered discretion to decide whether to seek enforcement the Board likewise "has an absolute right to withdraw its petition at its pleasure." *Id.* at 370. This Court rejected that proposition and held that once the Board had invoked the appellate court's jurisdiction by filing its petition to enforce, "permission to withdraw must rest in the sound discretion of the court to be exercised in the light of the circumstances of the particular case." *Id.*

In sum, there is no law of nature that requires that the authority to initiate an adjudicative proceeding necessarily carries with it the authority to terminate that proceeding without the approval of the adjudicative tribunal. Rather, under each statute it is for the legislature to fix the respective roles of the initiating party and the adjudicator with respect to the settlement of cases after the adjudicative process has commenced.[3]

Indeed, in this case petitioners themselves concede that "[o]nce the hearing" of an unfair labor practice case "has begun," the General Counsel's authority to settle without Board approval ends. *See* Pet. Br. at 18 n.7. By this concession petitioners acknowledge that the General Counsel's "prosecutorial" authority under the Act does not encompass an absolute and unfettered discretion to settle every case in which a complaint has issued.

Thus, the real dispute here is not *whether* Board approval of settlements is required but *when*. And as we proceed to show, the language and history of the statute teach that the dividing line created by Congress is not

[3] There is not even a law of nature that fixes the extent of the prosecutor's authority in initiating cases; this, too, is for the legislature to determine. *See Dunlop v. Bachowski*, 421 U.S. 560 (1975) (holding that Secretary of Labor's decision not to challenge a union eelction under title IV of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 481 *et seq.*, is subject to judicial review).

the start of the hearing but *the start of the adjudicative process which begins with the issuance of a complaint.*[14]

B. (1) We start with the statutory provisions which define the substantive rights and duties under the Act and the procedure for enforcing those rights. Those provisions, standing alone, indicate that once a case is brought to the Board by the filing of a complaint, Board action is required to resolve that case.

Section 7 of the Act, 29 U.S.C. § 157, creates certain rights for employees including "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Those rights were created to further the public policy stated in the Act, yet, at the same time, are in essence "private rights within the statutory scheme." *Auto Workers v. Scofield*, 382 U.S. 205, 218 (1965). Section 8, 29 U.S.C. § 158, in turn, imposes certain prohibitions on employers and on labor organizations.[5] And § 10, 29 U.S.C. § 160, provides the procedure for enforcing those prohibitions and vindicating the rights stated in § 7.

[4] In arguing that Board approval is required for post-complaint settlements, we do *not* contend that such settlements must be "formal" settlements, *viz.*, settlements embodied in consent cease-and-desist orders. Rather, all we are arguing is that just as the Board now passes on whether to permit an informal settlement after a hearing has begun, so, too, the Board is to pass on informal settlements prior to hearing but post-complaint.

[5] The prohibitions contained in § 8 are largely designed to protect the rights stated in § 7. Certain of the unfair labor practices defined in § 8, however, are aimed at protecting employers, *e.g.*, § 8(b)(3), 29 U.S.C. § 158(b)(3) (requiring unions to bargain in good faith), or "neutrals," *see* § 8(b)(4), (e), 29 U.S.C. § 158(b)(4), (e). These latter prohibitions create a species of "private rights" in employers and "neutrals."

The § 10 procedure begins with the filing of an unfair labor practice charge, typically by the aggrieved employees or their representative. Upon the filing of the charge, § 10(b), 29 U.S.C. § 160(b), creates a broad, discreationary authority *with respect to the issuance of an unfair labor practice complaint*:

> Whenever it is charged that any person has engaged or is engaging in any . . . unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing . . .

Once this discretionary authority is exercised in favor of issuing a complaint, the Board's formal, adjudicative process is triggered. Thus, § 10(b) goes on to provide that after a complaint is served

> The person so complained of shall have the right to file an answer to the . . . complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint.

And § 10(c), 29 U.S.C. § 160(c), states that:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its finding of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice . . . If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of act and shall issue an order dismissing the said complaint.

Once the Board enters a "final order," the judicial phase of the process for adjudicating unfair practice

cases is open. Section 10(f) of the Act, 29 U.S.C. § 160(f), provides for judicial review of the Board's order at the behest of any "person aggrieved" by what the Board has done. This provision permits a charging party to secure judicial oversight of Board action, "which serves the 'public interest' by guaranteeing that the Board interpretation of the relevant provisions accords with the intent of Congress." *Auto Workers v. Scofield, supra*, 382 U.S. at 219.

Thus, under the plain words of the statute, every case in which an unfair labor practice complaint is issued is to culminate either in an "order . . . dismissing the . . . complaint" or "an order requiring [the charged party] to cease and desist from such unfair labor practice [as is found to have been committed]." And this order of the Board is to provide the predicate for the judicial review a charging party is entitled to secure. Most importantly for present purposes, the statute provides *no* authority, once a complaint has issued, for pretermiting a Board decision or judicial review.

(2) Section 3(d), 29 U.S.C. § 153(d), defines the General Counsel's role in this integrated statutory scheme:

> He shall have final authority, on behalf of the Board in respect of the investigation of charges and issuance of complaints under section 10 and in respect of the prosecution of such complaints before the Board. . .

Section 3(d) thus delegates to the General Counsel, two discrete areas of authority:

First, acting "on behalf of the Board," the General Counsel is vested with the discretionary power to decide whether to issue complaints (and whether to dismiss or to settle charges without issuing complaints).

Second, where a complaint is issued, § 13(d) confers on the General Counsel the authority to prosecute com-

plaints "*before the Board*," as "an advocate in support of the complaint," *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 138 (1975). The very terms of that latter grant of authority imply that the General Counsel is to present cases *to the Board* for its decision rather than to pretermit such a presentation by settling the case on the General Counsel's own terms.

(3) In sum, nothing in the statutory language suggests that the General Counsel is empowered to settle cases pending before the Board without any action by the Board and without any right of the charging party to judicial review. Rather, as the Third Circuit concluded in *Leads & Northrup Co. v. NLRB, supra*:

> Clearly, once a complaint issues the statutory scheme contemplates Board action. Anything less, such as informal actions of its agents in dismissing such complaints over the objections of the charging party, is arbitrary and capricious. . . . [I]f an amicable adjustment of a labor dispute cannot be brought about through informal negotiations with the consent of all the parties, after the issuance of a complaint, then such informal proceedings must be formalized for Board action within the statutory scheme, thereby creating a record for judicial review. [357 F.2d at 533] [6]

C. The conclusion derived from the Act's language and structure is confirmed—indeed compelled—by the legislative history of the LMRA, the statute which created the office of General Counsel.

[6] *See also ILGWU v. NLRB*, 501 F.2d 823, 831 (D.C. Cir. 1974) (MacKinnon, J.):

> [A]fter a complaint has issued and the administrative process initiated, certain actions which broadly conceived might be characterized as "prosecutorial" assume essentially adjudicatory attributes. Such is the case where the General Counsel, acting for the Board, withdraws a complaint on the basis of an informal settlement agreement which provides for an adjustment of the conflicting interests of the private parties and thus partially or wholly remedies the underlying labor dispute.

(1) As petitioners explain in their brief, under the Wagner Act as it stood prior to the enactment of the LMRA, the Board was "authorized to prosecute as well as adjudicate all unfair labor practice charges." Pet. Br. at 19. In 1947, the House passed a bill (the Hartley bill, H.R. 3020, 80th Cong., 1st Sess) which would have created both a " 'new independent agency under an administrator to be appointed by the President (subject to Senate confirmation) to perform the investigating and prosecuting function' " and a new and separate agency to adjudicate unfair labor practice complaints; the Senate passed a bill (the Taft bill, S. 1126, 80th Cong., 1st Sess.) which did not disturb the basic structure of the NLRB; and § 3(d) was developed by the Conference Committee as a compromise to "accomplish[] the 'separation of functions within the frameworking of the existing agency by establishing a new statutory office, that is, a general counsel of the Board' to exercise prosecutorial authority independent of the Board." Pet. Br. at 20 n.10.

On the floor of the Senate the conference agreement was vigorously attacked "on the ground that it concentrated too much authority in one government official." *Id.* at 21. Senator Taft responded (in words petitioners' brief quotes in part, at 21-22):

> The Board itself has been sensitive to the reproach that it acts as judge, jury, and prosecutor and in recent years has promulgated regulations which have delegated the power of issuing complaints to the various regional directors. Presumably the General Counsel would keep these regulations in effect except that the regional directors would act pursuant to his general instructions rather than those of the Board. The present regulations permit a person aggrieved by the refusal of a regional director to issue a complaint to appeal the matter to Washington.

This is not an adversary proceeding but simply a review, based upon the confidential report of the field staff which conducted the investigation. Presumably, under the conference agreement such appeals would be routed to the General Counsel's office rather than to the Board. The assumption that the Board itself presently reviews these appeals, however, is utterly erroneous. According to the testimony of the chairman of the Board these appeals are considered by an anonymous committee of subordinate employees. *What the conference amendment does is simply to transfer this 'vast and unreviewable power' from this anonymous little group to a statutory officer responsible to the President and to the Congress.* So far as having unfettered discretion is concerned he, of course, must respect the rules of decision of the Board and of the courts. In this respect his function is like that of the Attorney General of the United States or State Attorney General. [93 Cong. Rec. 6589 (1947); 2 National Labor Relations Board, Legislative History of the Labor Management Relations Act of 1947 at 1623 (hereinafter "LMRA Leg. Hist.")]

Thus, § 3(d) was enacted not because Congress viewed unreviewable administrative authority as desirable and wished to insulate a greater range of decisions from review; rather the point of § 3(d) was to provide for *increased* accountability with respect to those decisions which, prior to 1947, were made by "an anonymous little group." And the legislative materials teach, as petitioners properly state, "*that the decisions to be entrusted to the General Counsel were not in practice reviewed by the Board under the original Act, but instead had been delegated to 'an anonymous committee of subordinate employees.'*" Pet. Br. at 21 (emphasis added)

(2) Given the congressional intent underlying § 3(d), in order to understand the scope of the General Counsel's authority under that section it is necessary to ascertain what powers "had been delegated to the "anonymous committee of subordinate employees" prior to 1947. Petitioners' presentation to this Court—without discussion and

without any substantation—rests on the assumption that the authority to settle cases before the Board was such a delegated power. Based on that unsubstantiated assumption petitioners boldly asset that the power to settle cases pending before the Board was transferred to the General Counsel in 1947. Petitioners are simply wrong.[7]

The Board's published rules and regulations for the years prior to 1947 do not identify where the locus of authority rested for settling those cases in which a complaint had issued. But the Board's procedures and practices were the subject of voluminous contemporaneous literature authored prior to 1947, and that literature makes plain that once the Board's formal processes were invoked, it was *for the Board itself—and not for a staff committee*—to decide whether to terminate the case by means of a settlement.

Probably the most authoritative explanation of the Board's practices prior to 1947 is the monograph on the NLRB issued in 1941 by the Attorney General's Committee on Administrative Procedure. That monograph described the Board's settlement policy as follows:

> If the investigation [of unfair labor practice charges] reveals that the charges, or some of them, are probably meritorious, regional offices are under standing instructions to make every effort to arrive at an informal settlement, agreeable to the parties, before recommending the issuance of a complaint . . .
>
> . . .Occasionally a settlement agreement is submitted to the Secretary [of the Board] for his comments, but this is done only if the Regional Director is du-

[7] The discussion that follows addresses exclusively the Board's practice prior to 1947 with respect to the settlement of cases as that is the only issue presented here. The question of whether, prior to 1947, the power to *withdraw* complaints absent a settlement had been delegated by the Board to the staff and was included in the transfer of authority to the General Counsel is a separate question, one that is not raised by this case, and one that is not explored in any of the sources on which we rely in the discussion that follows.

bious about some aspect of the arrangement. *If a complaint has been authorized prior to the adjustment of the controversy, however, the proposed settlement must be sent to Washington for Board approval. This variation in practice is a consequence of the Board's policy with respect to settlements.* In order to facilitate the negotiation of a settlement during the investigation of charges, the respondent is rarely required to admit his guilty by stipulating to the entry of a Board order or a consent decree of a Circuit Court of Appeals. *If the case has progressed to the point of authorization of a complaint, however, Board approval is not given to a settlement agreement unless it contains such a stipulation, or compelling reasons appear for its failure to do so.* [Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies: National Labor Relations Board* at 7-8 (1941) (emphasis added).]

In its *Final Report*, the Attorney General's Committee commended the Board's handling of the settlement process. The Committee stated:

> In labor relations one might expect a high percentage of contested cases, yet in the first four years of its existence the National Labor Relations Board closed 12,227 unfair labor practice cases, in only eight percent of which were formal complaints issued and only four percent of which were formal decisions made. [Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies: Final Report* at 35 (1941).]

The Committee especially praised the Board's procedures for securing "consent dispositions after issuance of formal complaint," *id.* at 42, noting that whereas the Federal Trade Commission "will not enter a consent order unless the respondent files an answer to a formal complaint or signs a stipulation, both of which are matters of public record, admitting some or all of the charges," in the Committee's view it is "highly desirable in cases

of this sort to permit consent to the entry of an enforceable order without requiring admissions," and "[s]uch is the practice of the National Labor Relations Board":

> After the complaint has been issued, the respondent upon admitting only the facts of his business from which the Board may find that he is engaged in interstate commerce, may consent to the entry of an order specifying the practices which he agrees to cease and the affirmative action which he agrees to take. He is not required to admit any facts concerning the practices alleged in the complaint. The Board then makes findings that he is engaged in interstate commerce, that a complaint has been issued, and that the stipulation, which is set forth in full has been made; the Board thereupon issues the order agreed upon in the stipulation and no further findings concerning the facts or the alleged violations are made. [*Id.*] [8]

The Attorney General's Committee did recommend changes in *other* aspects of the NLRB's procedures and those recommendations led to the creation of the "anonymous committee" to which Senator Taft referred during the LMRA debates. In particular, in its monograph on the NLRB (at 8) the Attorney General's Committee had found that the Regional Directors were "required to request the Board to authorize the issuance of a complaint" and "[a]ll requests for authorization [w]ere reviewed under the supervision of the secretary" of the Board; and in its Final Report, the Committee recommended "that the power to initiate action by issuance of complaints be delegated to Regional Directors or other responsible officers, so as to achieve a large degree of internal separation," *Final Report*, *supra*, at 158.

Within months of this recommendation the NLRB implemented what is described, in its 1941 Annual Report,

---

[8] For early examples of the type of orders to which the Committee was referring, *see, e.g., Pure Oil Co.*, 6 NLRB 818 (1938); *Abrasive Co.*, 7 NLRB 908 (1938).

as "a substantial reorganization . . . and some changes in procedures . . . to make possible a more complete delegation of administrative responsibility to staff members . . ."; in effecting these changes, the Board stated, "the suggestions of the Attorney General's Committee on Administrative Procedures were given careful consideration and followed to the extent that available staff and the nature of problems made it possible to do so." 6 *NLRB Annual Report* 3-4 (1941). Specifically, the Board created an "authorization and appeals committee," consisting of three high-ranking staff members, to "consider[] all appeals [from refusals to issue complaints] and requests to issue complaints sent in from the field." *Id.* at 8. The Board explained:

> The previously existing delegation of authority by the Board to staff members to dispose of cases by informal adjustment and to authorize formal proceedings has been broadened and expanded and, in line with the recommendations of the Attorney's General Committee Report, only cases involving perplexing and novel issues of law or policy are now brought to the Board for guidance in the administrative phases. [*Id.* at 4]

One year later, the Board further delegated authority with respect to the issuance of complaints, authorizing the Regional Directors to act on their own authority in this regard. 7 *NLRB Annual Report* at 11-12 & n.5 (1942). Under this further delegation, only "in cases where policy matters or novel questions of law or fact are involved," were the Regional Directors expected to submit the matter to the Authorization and Appeals Committee. *Id.*[9]

Significantly, none of these delegations affected the Board's authority to pass upon the resolution of cases

[9] For a discussion of the background of and rationale for these delegations of authority as explained by the chairman of the NLRB at the time these events transpired *see* H. Millis & E. Brown, *From the Wagner Act to Taft-Hartley*, 53-55 (1949).

once the Board's formal processes were invoked by the issuance of a complaint. Rather, as the Board explained in its 1944 Annual Report:

> Even though formal procedings have been started, the parties have full opportunity, at every stage, to settle the case in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or during the course of the hearing, the parties may enter a settlement.
>
> *Under this settlement stipulation, the parties agree to forego the right of hearing and that the Board may issue an order* requiring the employer to take such affirmative action as will remedy the allegations of unfair labor practices. Usually, the settlement stipulation contains the employer's consent to the Board's application for the entry of a decree by the appropriate Circuit Court of Appeals enforcing the Board's order.
>
> *All settlement stipulations are subject to the approval of the Board in Washington.* [9 *NLRB Annual Report* 13-14; emphasis added.] [10]

(3) In sum, at the time the LMRA was enacted the common understanding was that the administrative process is divided into two phases, an informal phase before a complaint issues, and a formal phase triggered by the issuance of the complaint. Pursuant to recommendations of the Attorney General's Committee, the Board, by 1947,

[10] In 1946, the Board's Director of Information reaffirmed this policy in an official guidebook to the NLRB that he prepared. *See* L. Silberberg, *A Guide to the National Labor Relations Act: Procedures and Practices 33* (1946).

We have found one secondary authority from the pre-1947 period which states that some unfair labor practice cases were settled informally, *viz*, without the entry of a consent cease-and-desist order, prior to 1947. *See* J. Rosenfarb, *The National Labor Policy and How It Works* 517 (1940). This author states that once a complaint had issued, "board aproval [wa]s necessary" for such an informal settlement. *Id.*

had essentially delegated the authority to make decisions in the informal phase to the staff, with the Authorization and Appeal Committee serving as the ultimate staff authority on these matters. It was the Authorization and Appeal Committee's authority that Congress intended to transfer to the General Counsel in enacting § 3(d). But that Committee did not exercise any authority regarding settlements once the formal adjudicatory phase of a proceeding commenced; Board approval was required for settlements *of cases in which complaints had been issued.* Consequently, no one suggested during the course of the legislative debates over § 3(d) that the proposed section would confer on the General Counsel the authority to settle cases, without Board approval, after the General Counsel has triggered the Board's adjudicatory procedures by filing a complaint with the Board. And § 3(d) cannot be read as so empowering the General Counsel.

C. Petitioners argue that permitting any form of review of the General Counsel's settlement decisions "would defeat the overriding policy favoring settlements." Pet. Br. at 28. Petitioner's fear—assuming *arguendo* it were somehow relevant to the *statutory* question posed here—has no basis in reality.

To begin with, nothing in our argument would affect the General Counsel's authority to enter into informal settlements, without any review, prior to the issuance of a complaint, because as we have acknowledged the General Counsel enjoys complete discretion to decide whether to issue a complaint (or whether to settle in lieu of doing so). Most informal settlements are reached pre-complaint.[11] Moreover, once the General Counsel actually

[11] In fiscal year 1983, for example, the most recent year for which statistics are available, almost 65% of the 10,504 informal settlements were arrived at pre-complaint. 48 *NLRB Annual Report* 183 (1983).

Petitioners argue that under the Act "[s]ettlement often becomes possible only after a complaint is filed because it takes the reality rather than the threat of a complaint to bring about a settlement." Pet. Br. at 37. But under the Board's rules, *see* NLRB Statement of Procedures, § 101.7(a), 29 C.F.R. § 101.7(a) and the *NLRB Casehandling Manual* § 10126.2, a respondent is notified of a Regional Director's decision to issue a complaint after that decision is made but before the complaint is actually issued, and a fifteen-day period is set aside to explore settlement possibilities. This practice provides all of "the reality" needed to stimulate settlements discussions. Indeed, it is at least arguable that a rule which provided for NLRB review of post-complaint informal settlements would stimulate even more informal settlements *prior to complaint.* And it is such settlements—those occurring *before* the start of the formal administrative process—that the Attorney General's Committee on Administrative procedure termed "the life-blood of the administrative process." *Administrative Procedure in Government Agencies: Final Report, supra,* at 35.

has issued a complaint, and thereby elected to "become[] an advocate before the Board," *NLRB v. Sears, Roebuck & Co., supra,* 421 U.S. at 138, the General Counsel's views and those of the charging party are more likely than not to be congruent and thus it will be relatively rare for the charging party to have objections to a settlement.

Perhaps the best evidence that providing for NLRB review of post-complaint informal settlements will not interfere with the settlement process is the fact that since 1966 judicial review of such settlements review has been available in the Third Circuit and since 1974 in the D.C. Circuit (which has jurisdiction over petitions to review any NLRB case, *see* 29 U.S.C. § 160(f)),[12] yet the General Counsel's ability to settle cases has not been disrupted in any way. To the contrary, in the two decades since *Leeds & Northrup* was decided only three cases, in addition to the instant case, have arisen in which a charging party has sought judiical review of a post-

[12] *See Leeds & Northrup Co. v. NLRB, supra* and *ILGWU v. NLRB, supra.*

complaint informal settlement.[13] And in those two decades, the proportion of cases which are settled informally after the issuance of a complaint has *risen* from 25%, *see* 30 *NLRB Annual Report* 181, 188 (1966), to 60%, *see* 48 *NLRB Annual Report* 168, 183 (1983). Thus, petitioners' professed fear that permitting (or more precisely continuing to permit) review of post-complaint informal settlements will interfere with the settlement process is without substance.

In any event, even if providing for Board review of post-complaint settlements would to some degree interfere with the General Counsel's ability to settle at that stage, that interference would simply be the "price" of complying with the statutory mandate Congress established, and providing some check on the manner in which cases before the Board are resolved. Thus, petitioners' concerns about the practical effect of providing for Board review of post-complaint settlement—even if valid—are addressed to the wrong body, and can provide no basis for this Court to preclude review in this case.

D. Petitioners rely on this Court's per curiam decision, decided without argument, in *Cuyahoga Valley Ry. Co. v. United Transportation Union*, —— U.S. ——, 54 L.W. 3299 (Nov. 14, 1985). Petitioners overread that case.

The issue in *Cuyahoga Valley* was whether the Secretary of Labor's decision to withdraw a citation issued under the Occupational Safety and Health Act of 1970,

---

[13] *ILGWU v. NLRB, supra; George Banta Co. v. NLRB*, 626 F.2d 354 (4th Cir. 1980); *Jackson v. NLRB*, 784 F.2d 759 (6th Cir. 1986). In two other cases, review was sought of a settlement that was not embodied in a Board order but which had been arrived at after a hearing had commenced and hence was submitted to an Administrative Law Judge for approval. *Oshkosh Truck Corp. v. NLRB*, 530 F.2d 1249 (9th Cir. 1976); *George Ryan Co. v. NLRB*, 609 F.2d 1249 (9th Cir. 1979).

29 U.S.C. § 651 *et seq.*,—a decision which was *not* made pursuant to a settlement but rather was based upon the Secretary's conclusion that he lacked jurisdiction over the employer, *see* 54 L.W. at 3299—is subject to review before the Occupational Safety and Health Review Commission and ultimately before the courts. This Court answered that question in the negative. That holding, of course, says nothing about Congress' determination as to the NLRB's authority to review the action of the General Counsel in settling an unfair labor practice case.

There is, to be sure, a *dictum* in *Cuyahoga Valley* which can be read as stating a general rule that a "necessary adjuctant of th[e] power [to initiate litigation] is the authority to withdraw . . . and enter into settlement discussions" and that providing for review of settlements would result in "an comingling of roles." 54 L.W. at 3300. That *dictum*, we respectfully submit, if read as a statement of a general rule rather than as a statement of the government precept under the OSH Act, does not bear more sustained consideration.

As we have seen, in a variety of contexts—including at least some NLRA contexts—the authority to initiate litigation does *not* carry with it an unfettered authority to terminate the litigation, and the adjudicative tribunals whose processes have been invoked can and do review settlement agreements. Pp. 9-10, *supra*. That being so, it is not possible to state a rule of general applicability with regard to this matter; rather, each stautory scheme must be separately evaluated to determine to what extent Congress intended to insulate various decisions of the party with the power to initiate a proceeding. *Cf. Dunlop v. Bachowski, supra*. And as we have shown, the results of that inquiry in the instant case are clear: Congress did not intend to confer upon the General Counsel the unreviewable authority to settle cases before the Board absent the approval of the Board.

II. The General Counsel's Action In Setting This Case And Withdrawing The Complaint Without Board Approval Is Subject To Judicial Review Under Either Section 10(f) Of The NLRA Or Under The Administrative Procedure Act.

That the General Counsel in this case exceeded the scope of her authority under § 3(d) in settling this case, post-complaint, without Board approval ultimately would be of no consequence if, as petitioners contend, the federal courts are not authorized to review and remedy the General Counsel's actions in that regard. As we proceed to show, however, petitioners are mistaken: the procedures followed in settling a complaint are reviewable either under § 10(f) of the NLRA or, alternatively, under § 704 of the APA.

A. NLRA § 10(f) is, as already noted, the provision which authorizes judicial review of "a final order of the Board" at the behest of an aggrieved party. Petitioners contend that under the "plain language" of § 10(f) "there is no basis for judicial review" here because the "General Counsel's decision to withdraw a complaint and enter into an informal settlement is not embodied in an order issued by the Board." Pet. Br. at 18-19. But petitioners ignore the fact that under the equally plain language of § 3(d), the General Counsel acts "*on behalf of the Board* in respect of the . . . prosecution of . . . complaints." Thus, the General Counsel's action in settling and withdrawing the complaint, while not an action *by* the Board, is nonetheless an action "*of* the Board" and hence reviewable under § 10(f).

Petitioners' effort to run away from the language of § 3(d) would produce a regime in which form, rather than substance, would determine when judicial review is available under § 10(f). For example, as Judge MacKinnon has observed, the "substantive elements of the formal and the informal settlement are essentially identical"; each "finally ends an unfair labor practice

proceeding by 'granting or denying in whole or in part the relief sought." *ILGWU v. NLRB*, *supra*, 501 F.2d at 830. Yet under petitioners' theory, formal settlements always are reviewable whereas informal settlements are reviewable only if reached after the start of a hearing and submitted to the Board for approval.

Moreover, if review under § 10(f) were to turn on whether the General Counsel or the Board acts, the General Counsel could commit a wrong by terminating a case without Board action and thereby profit from that wrong by avoiding review on the ground that the Board did not act. Alternatively petitioners' argument would enable the Board effectively to dismiss a case and evade review by entering an interlocutory (and hence unreviewable) order remanding the case to the General Counsel and then claim that the General Counsel's action in withdrawing the complaint pursuant to the remand is unreviewable because not an action of the Board. *Cf. Olympia Fields Osteopathic Medical Center*, 278 NLRB No. 119, 121 LRRM 1246 (Feb. 28, 1986). None of these results—which follow from petitioners' theory—finds any support in the statutory language.

Nor does the legislative history provide any solace for petitioners. By claiming that actions of the General Counsel are *ipso facto* unreviewable under § 10(f), petitioners necessarily argue that by enacting § 3(d) and establishing an independent General Counsel, Congress intended to constrict the jurisdiction of the federal courts as it stood at the time. But although the legislative history of § 3(d) is replete with expressions of Congress' intention to effect a separation of functions *within* the Agency,[14] there is not even a hint of any intention to limit the authority of the courts.

---

[14] *E.g.*, H.R. Rep. No. 245, 80th Cong., 1st Sess. 25 (1947), 1 LMRA Leg. Hist. 316; H.R. Rep. No. 510, 80th Cong. 1st Sess. 37 (1947), 1 LMRA Leg. Hist. 541; 2 LMRA Leg. Hist. 1538, 1622 (Sen. Taft).

The absence of such evidence is telling because, at the very same time § 3(d) was enacted, Congress amended § 10(f) and § 10(e)—which provides for judicial proceedings to enforce Board orders—in order to place "more responsibility" on the courts "for the reasonableness and fairness of Labor Board decisions." *Universal Camera Corp. v. Labor Board*, 340 U.S. 474, 489 (1951).[15] Congress did so because of its "dissatisfaction" with the "too restricted" role some courts were playing in reviewing Board actions under the Wagner Act. *Id.* at 484. Thus, as Judge MacKinnon, who was a member of Congress in 1947 and an active participant in the process leading to the enactment of the LMRA has stated in an opinion holding informal settlement to be judicially reviewable, the overall policy of the LMRA is to place "greater reliance on judicial review of unfair labor practice proceedings" than was true prior to 1947. *ILGWU v. NLRB*, *supra*, 501 F.2d at 830 n. 25. And given that policy "one justifiably would expect to find some evidence in the legislative history indicating an intent by Congress to restrict the jurisdiction of the courts, if that indeed were the case." *Id.*

Petitioners protest that reading § 3(d) and § 10(f) to permit judicial review of actions of the General Counsel "on behalf of the Board" would mean that "any decision of the General Counsel that finally disposes of a case"—including "decisions . . . declining to issue a complaint"—would be "subject to judicial review." Pet. Br. at 24 n.12. That is not necessarily true, however. Our reading of

[15] Under the Wagner Act, in review proceedings NLRB findings were conclusive "if supported by evidence." The LMRA amended this provision to require "substantial evidence on the record as a whole." As this Court has stated, in enacting this change "Congress expressed a mood." *Universal Camera Corp. v. Labor Board, supra,* 340 U.S. at 489. For statements of that mood, *see* H.R. Rep. 245, *supra,* at 451, 1 LMRA Leg. Hist. 33; S. Rep. 105, 80th Cong., 1st Sess. 26-27 (1947), 1 LMRA Leg. Hist. 432-33; H.R. Rep. No. 510, *supra,* at 55-56, 1 LMRA Leg. Hist. 559-60.

§ 3(d) and § 10(f) simply means that "any decision of the General Counsel that finally disposes of a case" is reviewable *to the extent the action would have been reviewable prior to 1947*, when no independent General Counsel existed. In other words, it is our submission that § 3(d) was not intended to insulate from judicial scrutiny decisions that were reviewable under the Wagner Act and that if an action of the General Counsel is presently unreviewable, it must be because of the nature of the act—that is, because the action, even if formerly taken by the Board, would not have been reviewable prior to 1947—and not because of the identity of the actor, *viz*, because it is the General Counsel who is acting.[16]

B. If, contrary to what we have just shown, § 10(f) does not provide for judicial review of actions of the General Counsel "on behalf of" the Board, § 704 of the APA, 5 U.S.C. § 704, immediately would be implicated. That section, by its terms, creates a cause of action to review "final agency action *for which there is no other adequate remedy in a court*"; thus § 704 would seem directly applicable if § 10(f) were not available as a means of reviewing the General Counsel's actions.

Petitioners argue that § 704 cannot be used to challenge the General Counsel's action in settling complaints because § 704 is subject to the limitations of APA § 701(a) which forecloses judicial review "to

[16] As petitioners correctly note, "[a]t the time of the adoption of Section 3(d), the courts had already concluded that at least some of the Board's prosecutorial decisions were not subject to judicial review," including the "decision not to issue complaint," Pet. Br. at 22; that was true even though, at the time of those decisions, there was no independent General Counsel and hence all prosecutorial decisions under the Act were decisions "of the Board." The reasoning that led the courts, prior to 1947, to hold such Board decisions unreviewable can equally be applied with respect to like decisions made by the General Counsel "on behalf of the Board"; thus, our argument here would not expand the scope of judicial review as it existed in 1947.

the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law," 5 U.S.C. § 701(a). Petitioners claim that "both of these statutory exclusions" apply here. Pet. Br. at 33. Once again, petitioners' arguments cannot withstand analysis.

1. To establish that the NLRA "preclude[s] judicial review," petitioners would have to make a "showing of 'clear and convincing evidence' of a . . . legislative intent . . . [to] restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967), *quoted in Heckler v. Chaney*, 470 U.S. 821, 830 (1985) Petitioners concede that "the National Labor Relations Act does not in so many words declare that there shall be no judicial review of the General Counsel's prosecutorial decisions." Pet. Br. at 33. Yet petitioners contend nonetheless that the statutory language and legislative history of § 3(d) "indicates that Congress intended to insulate the General Counsel's decisions from any further review, administrative or judicial." Pet. Br. at 35.

Insofar as petitioners claim a congressional intent to foreclose *administrative* review, our showing in Part I is dispositive; as we there demonstrated, although Congress did intend to give the General Counsel certain "final authority" *vis-a-vis* the Board, that authority does *not* include an unlimited prerogative to settle cases in which the Board's formal processes had been invoked. Congress thus did not intend to foreclose Board review of post-complaint settlements.

Similarly, insofar as petitioners assert a congressional intent to foreclose *judicial* review, our showing in Part II(A) is determinative. As we there proved, what this Court said in rejecting a like claim under another statute is equally true here: "there is not even the slightest evidence that Congress gave thought to the matter of the preclusion of judicial review. 'The only reasonable inference is that the possibility did not occur to the Congress.'" *Dunlop v. Bachowski, supra*, 421 U.S. at 567.

Petitioners thus fall far short of showing "clear and convincing evidence" that the NLRA "preclude[s] judicial review" of the General Counsel's action here.

2. Nor are petitioners on any firmer ground in arguing that the General Counsel's decision to settle and withdraw a complaint is "committed to agency discretion by law" and hence not reviewable on this ground. This is, as the Court has stated, "a very narrow exception," one that applies only "in those rare instances where "statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971), *quoted in Heckler v. Chaney, supra*, 470 U.S. at 830.

This is plainly not one of "those rare instances." The claim in this case is that the LMRA establishes a procedure for resolving cases once a complaint has issued and that the General Counsel violated those procedures and overstepped the limts of her authority in settling the case on her own, without securing the approval of the Board. What we seek, therefore, is a remand to the Board for an opportunity to present our objections to a disinterested tribunal. Plainly that claim of procedural irregularity can be adjudicated using the traditional tools of statutory analysis, and thus it can hardly be said that there is "no law to apply" here.

Petitioners attempt to divert attention from the procedural claim presented in this case by challenging instead the reviewability of *substantive* attacks on settlement agreements (such as the challenges respondent seeks to present to the Board). That issue is not presented here however, and this Court could—and given the posture of this case, we submit should—uphold the reviewability of the procedures followed in reaching a settlement without deciding whether substantive attacks on a Board de-

cision approving a settlement would be subject to judicial review. That being so, we note only the following:

As we have seen, pp. 9-10 *supra*, in a variety of contexts the courts routinely review various forms of settlement agreements, and draw upon a rich body of well-developed law is so doing.[17] Indeed petitioners concede that a Board order approving a settlement, "like any other final action of the Board, is subject to judicial review." Pet. Br. at 18 n.1.[18] Thus, there is no merit to petitioners' claim that there would be "no law to apply" even if this were a challenge to the merits of the settlement by which the General Counsel sought to resolve this case.

For the reasons just stated, petitioners' heavy reliance on *Heckler v. Chaney*, *supra*, *see* Pet. Br. at 37-40, is misplaced. In *Heckler* the Court, while reaffirming the general principle that agency action is to be deemed "committed to agency discretion by law" only "in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to reapply,'" 470 U.S. 830, held that where a challenge is brought to "an agency's refusal to take requested enforcement action . . . the presumption is that judicial review is not available," *id.* at 831. The Court based that presumption, *inter alia*, on the fact that "[t]his Court has recognized . . . over many years that an agency's decision not to

[17] For example, in reviewing a proposed consent decree the "[c]ourts judge the fairness of a proposed compromise by weighing the plaintiff's likelihood of success on the merits against the amount and form of the relief offered in the settlement," *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981); *see also Firefighters Local 93 v. City of Cleveland*, —— U.S. ——, 54 L.W. 5005, 5012 (July 2, 1986).

[18] *See also Marine Engineers Beneficial Ass'n No. 13 v. NLRB*, 202 F.2d 546 (3d Cir. 1953), *cert. denied*, 346 U.S. 819; *Textile Workers Union v. NLRB*, 294 F.2d 738 (D.C. Cir. 1961); *Concrete Materials of Georgia v. NLRB*, 440 F.2d 61 (5th Cir. 1971); *NLRB v. Oil, Chemical & Atomic Workers*, 476 F.2d 1031 (1st Cir. 1973).

prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion." *Id.*

In contrast, there is no similar tradition of treating the power to settle cases pending before an adjudicative tribunal as resting within the sole discretion of the initiating party; as we have seen, the practice in this regard varies from statute to statute and from forum to forum. Pp. 9-10 *supra*. Consequently, there is no basis to presume that judicial review of a settlement is generally unreviewable, and those seeking to foreclose review should bear the usual burden of so proving. Petitioners, as we have shown, have failed to carry that burden. And *a fortiori*, there is no reason to presume, let alone to conclude, that judicial review of the *procedures* followed in reaching a settlement—which is all that is involved here—is foreclosed.

In sum, neither APA § 701(a)(1) or (a)(2) preclude review under APA § 704 in this case.[19]

III. The Court Below Properly Remanded This Case To The NLRB For It To Hear And Resolve Respondent's Objections To The Settlement.

The only remaining question concerns the propriety of the judgment that the court of appeals entered which orders that "the proceedings are remanded to the Board for the purposes of holding an evidentiary hearing on

[19] If this Court were to conclude that only APA § 704, and not NLRA § 10(f), provide the basis for reviewing the General Counsel's action in this case, it would follow that jurisdiction here lay in the district court and not in the court of appeals. *Cf. Leedom v. Kyne*, 358 U.S. 184 (1958). In that event, the appellate court should have remanded the case to the district court pursuant to 28 U.S.C. § 1631; and at this stage this Court, in the exercise of its authority to "remand the case and direct the entry of such appropriate judgment, decree or order . . . as may be just under the circumstances," 28 U.S.C. § 2106, should remand this case to the court of appeals with appropriate instructions.

[respondent's] objections to the informal settlement agreements." Pet. App. 19a. As we proceed to show, petitioners' challenges to that order are without merit.

In Part I we demonstrated that once the Board's formal adjudicative procedures have been invoked by the filing of a complaint, Board approval is required before a case can be resolved by settlement. Because that is so, there can be no doubt that the court of appeals properly remanded this case to the Board for the Agency to consider respondent's objections to the settlements. Indeed although petitioners question the appellate court's jurisdiction in this matter, petitioners do not appear to challenge the propriety of a remand if jurisdiction exists.

Petitioners do vigorously contest the appellate court's further direction to the Board to hold "an evidentiary hearing" on respondent's objections to the settlements. As petitioners correctly correctly note, the weight of the authority in the lower courts requires such a hearing only where an objection raises factual issues which are contested. Pet. Br. at 46 & cases cited. The court below in the instant case, in contrast, interpreted *Leeds & Northrup Co. v. NLRB, supra,* to mandate a hearing without regard to whether "factfinding is essential." Pet. App. 11a.[20]

It is not necessary for the Court in the instant case to decide whether an evidentiary hearing is always required

---

[20] *Leeds & Northrup* need not be so read. What *Leeds & Northrup* held is that "if an amicable adjustment of a labor dispute cannot be brought about through informal negotiations with the consent of all the parties, after the issuance of a complaint, then such informal proceedings must be formalized for Board action within the statutory scheme, *thereby creating a record for judicial review.*" 357 F.2d at 533 (emphasis added). In other words, the LMRA and APA, as interpreted in *Leeds & Northrup,* "require a record to be made for a reviewing court." *Id.* Needless to say, requiring a "record to be made" is not necessarily the same as requiring that an evidentiary hearing be conducted.

on objections to settlements. For in the instant case, the General Counsel's stated reason for rejecting respondent's objections to the settlements was that "*insufficient evidence was presented* to establish that the Regional Director abused his discretion in approving an informal settlement agreement with a non-admission clause." Pet. App. at 15a (emphasis added). Thus the General Counsel's own decision in this matter turns on the state of the evidentiary record, *viz.*, whether respondent had shown, in fact, that the informal settlements would not dissipate the effects of the violations of the Act and would not permit the holding of a fair representation election. In these circumstances, it was surely appropriate for the court of appeals, in remanding this case to the Board, to direct the Agency to afford respondent an opportunity to adduce evidence on factual issues that the General Counsel deemed determinative.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

GEORGE MURPHY
(Counsel of Record)
PETER FORD
1775 K Street, N.W.
Washington, D.C. 20006
(202) 223-3111

Of Counsel:
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

DAVID SILBERMAN
LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006

REPLY

BRIEF

No. 86-594

In the Supreme Court of the United States

OCTOBER TERM, 1987

NATIONAL LABOR RELATIONS BOARD and ROSEMARY M. COLLYER, GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 23, AFL-CIO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board
Washington, D.C. 20570

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 86-594

NATIONAL LABOR RELATIONS BOARD and
ROSEMARY M. COLLYER, GENERAL COUNSEL,
NATIONAL LABOR RELATIONS BOARD, PETITIONERS

v.

UNITED FOOD AND COMMERCIAL WORKERS UNION,
LOCAL 23, AFL-CIO

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

We showed in our opening brief that a decision by the General Counsel of the National Labor Relations Board to enter into an informal settlement of an unfair labor practice proceeding, prior to the commencement of the hearing, is not subject to judicial review. Nothing in respondent's answering brief refutes our position.

1. Respondent's principal argument is that (i) once an unfair labor practice complaint has issued, the General Counsel may not informally settle the case without the Board's approval, and (ii) such approval, or the wrongful settlement of the case without the required approval, is a "final order of the Board" reviewable under Section 10(f) of the National Labor Relations Act, 29 U.S.C. 160(f). But

the first point is wrong; indeed, acceptance of it would require a dramatic change in current practice. The Board's regulations authorize the General Counsel to enter into informal settlements without Board action (see 29 C.F.R. 101.7, 101.9(b)(2), 102.18-102.19), and literally thousands of such settlements —all unlawful on respondent's view—are adopted every year (see Pet. Br. 30 n.17).[1]

a. Respondent begins by stating that "no law of nature" requires that the official authorized to commence an enforcement proceeding also be authorized to settle it informally (Br. 10). We agree that the question is one not of natural law but of congressional intent. But this Court has recognized that a grant of prosecutorial authority includes, at least presumptively, certain specific powers. Thus, in *Heckler* v. *Chaney*, 470 U.S. 821 (1985), the Court held that prosecutorial decisions are presumptively immune from judicial review. And in its recent decision in *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. 1 (1985), discussed in our opening brief (at 27-28), the Court held that the authority to withdraw a complaint is a "necessary adjunct" of the Secretary of Labor's authority to issue a complaint under the Occupational Safety and Health Act (*Cuyahoga*,

[1] Respondent's argument appears to sweep even broader. Respondent asserts that once a complaint is filed, "Board action is required to resolve that case" (Br. 11). If that were true, the General Counsel would need Board approval even to dismiss a complaint when new evidence reveals that there is no basis for the charge. Respondent states (Br. 17 n.7) that its discussion of the Board's practices does not address the General Counsel's authority to withdraw a complaint in the absence of a settlement, but respondent's interpretation of the statutory language appears to mandate Board review even when a complaint is withdrawn without settlement.

474 U.S. at 7). The Court stated that this was true whether the complaint was withdrawn to discontinue a prosecution or to facilitate a settlement (*ibid.*).[2]

Indeed, respondent's argument itself supports a general presumption that a prosecutor (the General Counsel) may informally settle a matter without the approval of the tribunal (the Board). Respondent cites (Br. 9-10) several restrictions upon a prosecutor's authority to discontinue an enforcement action, but these limitations are all expressly set forth in the governing rules.[3] The existence of these express limi-

[2] Respondent asserts (Br. 24-25) that *Cuyahoga Valley Ry.* is irrelevant because that case concerned the allocation of authority under the Occupational Safety and Health Act, while the present case arises under the National Labor Relations Act. But Congress adopted substantially similar divisions of authority in the two statutes. See Pet. Br. 28. Respondent points out (Br. 24-25) that the Secretary of Labor sought to discontinue the prosecution in *Cuyahoga Valley Ry.* not because of a settlement, but because he concluded that the prosecution was beyond the statute's jurisdiction. This Court did not distinguish between the two situations, however, and stated that the Secretary was authorized to discontinue an enforcement proceeding in favor of settlement discussions.

[3] See Fed. R. Crim. P. 11(c), 48(a); Fed. R. Civ. P. 23(e). Respondent also cites *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939), in which the Court stated that the Board did not have "an absolute right" to withdraw a petition filed in the court of appeals to enforce a Board order, but that "permission to withdraw must rest in the sound discretion of the court to be exercised in the light of the circumstances of the particular case" (305 U.S. at 370 (footnote omitted)). The decision in that case rested upon an express statutory limitation upon the Board's authority—Section 10(d) of the Act, 29 U.S.C. 160(d), which states that the Board may modify or set aside an order "[u]ntil [a transcript of] the record in a case shall

tations reinforces the general understanding that, absent an express provision to the contrary, a prosecutor may exercise informal settlement authority. Cf. Fed. R. Crim. P. 48(a) advisory committee notes (prior to the adoption of the rule limiting a prosecutor's authority to discontinue a criminal action, the prosecutor had unlimited authority to discontinue the action). With this presumption in mind, we turn to an examination of the statutory plan at issue here.

b. Relying on Section 10(b) and (c) of the Act, 29 U.S.C. 160(b) and (c), respondent asserts (Br. 13) that, "under the plain words of the statute, every case in which an unfair labor practice complaint is issued is to culminate either in [a Board] 'order * * * dismissing the * * * complaint' or 'an order requiring [the charged party] to cease and desist from such unfair labor practice [as is found to have been committed].'" But these provisions require no such thing: they merely set forth the procedure to be followed when a complaint does proceed to formal hearing and Board adjudication.[4] They do not deal at all with settlements, either formal or informal, or with the withdrawal of a complaint for any other reason, and they plainly do not prescribe the allocation of authority for such matters between the General Counsel and the Board.

---

have been filed in a court." Because the transcript had been filed, the Board was not free to withdraw the petition (305 U.S. at 368-370).

[4] Section 10(b) details the right of the charged party to respond to a complaint and testify at the hearing. Section 10(c) describes the quantum of evidence needed to support a Board finding of an unfair labor practice and the standards governing the order remedying the statutory violation.

As we discuss in our opening brief (at 19-28), the provision of the National Labor Relations Act that is relevant to the issue in this case is Section 3(d), 29 U.S.C. 153(d), which provides for the allocation of authority between the General Counsel and the Board. Section 3(d) grants the General Counsel "final authority, on behalf of the Board, in respect of the * * * issuance of complaints * * * and * * * the prosecution of such complaints before the Board." It is difficult to imagine a more comprehensive grant of prosecutorial authority unless the statute were to spell out with specificity all of the different powers exercised by a prosecutor.

Respondent acknowledges that the grant of "final authority" with respect to the issuance of complaints confers upon the General Counsel "unreviewable discretion to refuse to [initiate] an unfair labor practice complaint" (Br. 9, citing *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967)). Respondent contends that after a complaint is issued, however, the fact that Section 3(d) refers to "prosecution of such complaints before the Board" implies that "the General Counsel is to present cases *to the Board* for its decision rather than to pretermit such a presentation by settling the case on the General Counsel's own terms" (Br. 14 (emphasis in original)). But the phrase "before the Board" is not a limitation upon the General Counsel's authority; it merely names the tribunal in which the General Counsel exercises her prosecutorial authority. If Congress had intended a significant restraint upon the General Counsel's broad authority, it surely would have found a more direct and clearer way to say so.[5]

---

[5] The snippet from *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138-139 (1975), cited by respondent (Br. 14), is not to

c. Respondent places great emphasis upon the legislative history of Section 3(d). In our opening brief, we quoted Senator Taft's response to criticism that Section 3(d) would centralize prosecutorial authority in a single official; the Senator stated that the Board had already delegated that power to " 'an anonymous committee of subordinate employees' " and that Section 3(d) simply transferred this " 'vast and unreviewable power' " to " 'a statutory officer responsible to the President and to the Congress' " (Pet. Br. 21-22 (citation omitted)). Respondent seizes upon this statement, asserting (Br. 15-16) that the scope of the General Counsel's authority under Section 3(d) is defined by the practice at the time of the adoption of that provision, and that the General Counsel therefore may only exercise the authority that the Board had delegated to its employees before Section 3(d) was adopted in 1947.

But there is no warrant for reading Section 3(d) like the Seventh Amendment—by reference to the state of affairs in a particular year. Cf. *Tull* v. *United States*, No. 85-1259 (Apr. 28, 1987), slip op. 5. Section 3(d) does not by its terms allocate authority between the General Counsel and the Board on the basis of the administrative division of authority as it stood in 1947. And Senator Taft plainly did not mean that only such prosecutorial authority as had been delegated to staff would be allocated to the General Counsel, with the Board continuing to exercise every aspect of prosecutorial authority not previously delegated. Senator Taft was merely explaining that, in practice, much prosecutorial authority was already not exercised by the Board itself. Indeed, respondent suggests no reason why Congress would wish to codify an incomplete separation of prosecutorial and adjudicatory activities, a result that would be wholly inconsistent with the purpose of Section 3(d), which was to separate entirely the Board's prosecutorial and adjudicatory functions (see Pet. Br. 19-23).

Moreover, in 1947 there simply was no well-defined delegation of prosecutorial authority to the Board's employees. In 1941, prior to the creation of the Office of the General Counsel, the Attorney General's Committee on Administrative Procedures recommended that the Board delegate the "power to initiate action by issuance of complaints * * * to [its] Regional Directors or other responsible officers, so as to achieve a large degree of internal separation" (Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies: Final Report* 158 (1941)). The Board created an Authorization and Appeals Committee, consisting of three high-ranking staff members, to "consider[] all appeals [from refusals to issue complaints] and requests to issue complaints sent in from the field" (6 NLRB Ann. Rep. 8 (1941)). Appeals of refusals to issue complaints were "considered by the committee in the first instance and * * * then transferred to the Board or a member thereof, together with the committee's recommendation" (*ibid.*).[6] The regional offices' requests

---

the contrary. When the General Counsel decides to prosecute a complaint before the Board, she surely acts as "an advocate * * * in support of the complaint." But nothing in *Sears, Roebuck & Co.* suggests that the General Counsel lacks the power to withdraw a complaint in the exercise of her prosecutorial discretion.

[6] The Board's rules provided that appeals from a regional director's refusal to issue a complaint could be taken to the

for authorization to issue complaints were considered by the central offices in charge of field operations and case clearance, and by the Authorization and Appeals Committee in the event of disagreement among the other offices. The committee would refer questions "involving general policy or a new principle" to the Board. *Ibid.*[7]

In 1942, the Board made a general delegation to its regional directors of the power to issue complaints. Authorization by the Board was still required, however, "in cases where policy matters or novel questions of law or of fact [were] involved" (7 NLRB Ann. Rep. 11-12 (1942)).[8] If the regional director declined to issue a complaint, the rules provided that an appeal could be taken to the Board. *NLRB Rules and Regulations, Series 2, as amended,* Art. II, Sec. 9 (1942); see also note 6, *supra*.[9] The 1942 rules also continued the earlier delegation to regional directors of the authority to withdraw a

Board. *NLRB Rules and Regulations, Series 1, as amended,* Art. II, Sec. 9 (1936). Previously, such appeals had been reviewed and presented to the Board by the Secretary of the Board. Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies: National Labor Relations Board,* S. Doc. 10, 77th Cong., 1st Sess., Pt. 5, at 6-7 (1941) [hereinafter *NLRB Monograph*].

[7] Previously, the regional directors were "required to request the Board to authorize the issuance of a complaint"; all requests for authorization "[were] reviewed under the supervision of the secretary" of the Board. *NLRB Monograph* 8.

[8] For a further explanation of the 1941 and 1942 delegations, see H. Millis & E. Brown, *From the Wagner Act to Taft-Hartley* 53-55 (1949).

[9] These rules and regulations are reproduced in 7 NLRB Ann. Rep. 167-189 (1942).

complaint on a director's own motion prior to hearing. *Id.* Art. II, Sec. 8.[10]

In view of the fragmented distribution of the Board's prosecutorial authority prior to 1947, with the Board delegating some authority to the regional directors and retaining responsibility over the issuance of complaints in some circumstances, it cannot reasonably be concluded that Congress intended to transfer to the General Counsel only the prosecutorial authority that the Board had delegated to the Authorization and Appeals Commitee.[11] Instead, as we have shown, Congress sought in 1947 to separate all of the Board's prosecutorial functions from its adjudicatory functions.

Finally, even if the practice in 1947 were relevant in construing Section 3(d), it is by no means clear that post-complaint informal settlements were subject to Board approval at that time. The materials cited by respondent (Br. 17-21) describe the Board's processes with regard to *formal* settlements, which entail the entry of a Board order and, in many cases, consent to the entry of a court decree. See Pet. Br. 4-5;

[10] This power was first conferred on regional directors in 1936 (see *NLRB Rules and Regulations, Series 1, as amended,* Art. II, Sec. 8 (1936)), and they continue to exercise such authority today (see 29 C.F.R. 102.18). As early as 1939, the regional directors were also empowered to amend a complaint on their own motion prior to hearing, a power that they still retain. See *NLRB Rules and Regulations, Series 2, as amended,* Article II, Sec. 7 (1939); 29 C.F.R. 102.17.

[11] The Board's rules had been brought to Congress's attention through the Board's Annual Reports (cf. *NLRB* v. *Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 187 n.20 (1981)).

pages 11-12, *infra*.[12] While it also appears that before 1941 post-complaint informal settlements were subject to approval by the Board's Washington, D.C. headquarters, it is unclear whether the Board, acting through its Secretary, continued to exercise his authority after the creation of the Authorization and Appeals Committee and the delegation of complaint authorization authority to regional directors. The historical materials we have reviewed shed no light on this question one way or the other. And the absence of any clear evidence points up the difficulties that flow from the interpretive methodology proposed by respondent.[13]

[12] The cases that respondent cites (Br. 19 n.8) as examples of settlements that required Board approval—*Pure Oil Co.*, 6 N.L.R.B. 818 (1938), and *Abrasive Co.*, 7 N.L.R.B. 908 (1938)—were formal settlements. The *Pure Oil* settlement provided that "an order entered into in accordance with the above stipulation shall have the same full force and effect as an order entered by the Board after a full hearing, presentation of evidence, and the making of findings thereon" (6 N.L.R.B. at 821). The *Abrasive Co.* settlement contained a provision consenting to the entry of a court order should it become necessary for the Board to seek such an order "to enforce the terms and conditions of the settlement" (7 N.L.R.B. at 913). The excerpts from the Attorney General's Committee's *NLRB Monograph* and its *Final Report* (Br. 17-18, 19) also describe post-complaint formal settlements. In any event, those materials describe the Board's practices prior to the 1941 and 1942 delegations of authority, and therefore provide no evidence of the effect of those delegations.

[13] The only source cited by respondent for the proposition that the Board approved post-complaint informal settlements, J. Rosenfarb, *The National Labor Policy and How it Works* 517 (1940), was written prior to the Board's extensive delegation of prosecutorial authority to its regional directors and its Authorization and Appeals Committee. The other, later, sources cited by respondent (Br. 21 & n.10) fail to distinguish between the Board and its Authorization and Appeals Committee with respect to the exercise of prosecutorial authority. These sources state that decisions not to issue complaints, as well as post-complaint settlements, were subject to review by "the Board." Moreover, they cite as examples of settlements that required Board approval formal settlements that contained stipulations for entry of a Board "order requiring the employer to * * * remedy" the alleged unfair labor practice conduct. 9 NLRB Ann. Rep. 14 (1944); L. Silverberg, *A Guide to the National Labor Relations Act* 33 (1946).

d. In our view, the relevant question under Section 3(d) is whether an informal settlement after the filing of a complaint but prior to hearing is properly classified as an incident of prosecutorial rather than adjudicatory authority. See pages 2-4, *supra*. We submit that the differences between a formal settlement and an informal settlement make plain that the latter is an incident of prosecutorial authority and is thus within the range of authority that Congress conferred on the General Counsel when it enacted Section 3(d).

A formal settlement agreement, which requires the issuance of a complaint either prior to or at the same time as entry into the settlement, contains a waiver of a formal hearing, a recital of sufficient jurisdictional facts to establish the charged party's relationship to commerce, and an agreement as to the formal pleadings and other documents that will comprise the record in the case. *NLRB Case Handling Manual* §§ 10164, 10166 (Mar. 1983). The parties also agree to the entry of a Board order to remedy the unfair labor practices alleged in the complaint and, often, consent to the entry by the appropriate court of appeals of a decree enforcing the Board order. *Id.* § 10164.1.[14]

[14] Where the parties consent to the issuance of a Board order and the charged party fails to comply with the terms of

In an informal settlement, by contrast, the charged party simply agrees to halt the alleged unfair labor practice conduct and partially or completely restore the status quo ante. In exchange, the General Counsel gives her assurance that the charges will not be prosecuted and that the complaint (if one has issued) will be withdrawn. In the event that the agreement is violated, the regional director notifies the parties that prosecution of the charges will resume. The complaint is issued (or reissued if previously withdrawn), and pressed on its merits. The charged party may not be penalized directly for its violation of the settlement agreement. 29 C.F.R. 101.9(e)(2); *NLRB Case Handling Manual* § 10154 (Mar. 1983).

In sum, a formal settlement ends the case with a Board order placing restrictions upon the charged party's conduct; those restrictions are enforceable in a court of appeals. An informal settlement only results in cessation of the prosecution and withdrawal of the complaint (if one has issued). If the charged party fails to adhere to the terms of the informal settlement, no sanction may be imposed; the prosecution is simply resumed. This distinction in penalty starkly distinguishes the two types of settlements,

---

that order, the Board may petition the court for enforcement of its order. 29 C.F.R. 101.9(e)(1). To facilitate enforcement of the Board order, the formal settlement agreement usually contains an admission of facts sufficient to establish the commission of unfair labor practices. *NLRB Case Handling Manual* §§ 10166.6, 10168(8) (Mar. 1983).

Where there is consent to the entry of a court decree, the Board may seek summary enforcement of its order by the court of appeals. See *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318 (1961). If the charged party fails to comply with the court's decree, the Board may petition the court for a judgment of contempt. 29 C.F.R. 101.9(e)(1).

clearly identifying a formal settlement as an incident of the Board's adjudicatory authority and an informal settlement as an incident of the General Counsel's prosecutorial authority.[15]

e. Finally, our interpretation of Section 3(d) is supported by the settled administrative construction of the statute. This Court has repeatedly observed

---

[15] Once the hearing begins, the Board's rules require the General Counsel to obtain the approval of the administrative law judge before withdrawing a complaint; objections to an informal settlement entered into after that point are subject to review by the Board. See 29 C.F.R. 101.9(d)(1); Pet. Br. 18 n.7. This rule provides no assistance to respondent's claim here because, like the other restrictions upon prosecutorial authority cited by respondent, this limitation upon the General Counsel's informal settlement authority is expressly set forth in the Board's rules. No similar rule provides for Board review of informal settlements entered into after the issuance of the complaint but prior to commencement of the hearing.

The Board plainly selected an appropriate point at which to limit the General Counsel's informal settlement authority. The opening of the hearing has long been used to mark the end of the prosecutor's unilateral authority under the NLRA. Since the earliest days under the Wagner Act, the Board's regional directors have been empowered to withdraw or amend a complaint prior to hearing. See pages 8-9 & note 10, *supra*. Before the hearing opens there is no overlap of adjudicatory and prosecutorial responsibilities—indeed, the adjudicatory process has not yet begun—and therefore no need for striking a balance between those responsibilities. Congress endowed the General Counsel with final unreviewable authority, not only to commence and shape the prosecution of unfair labor practice cases, but also to consider and decide whether a case can be successfully prosecuted and whether the public interest would be better served by settlement. *Local 282, International Brotherhood of Teamsters* v. *NLRB*, 339 F.2d 795, 799 (2d Cir. 1964); *Jackman* v. *NLRB*, 784 F.2d 759, 763-764 (6th Cir. 1986); see also *Cuyahoga Valley Ry.* v. *United Transp. Union*, *supra*.

that "[t]he Board, of course, is given considerable authority to interpret the provisions of the NLRA. If the Board adopts a rule that is rational and consistent with the Act, then the rule is entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, No. 85-1208 (June 1, 1987), slip op. 14 (citations omitted)); see also *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 495, 497 (1979); *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 501 (1978). The most that can be said in favor of respondent's position is that Section 3(d) does not spell out the prosecutorial powers that Congress intended to confer. The Board has construed the Act as endowing the General Counsel with final authority to enter into informal settlements prior to hearing. See 29 C.F.R. 101.7, 101.9(b)(2), 102.18 - 102.19. That construction of the statute is reasonable and, for that reason, should be upheld by this Court.[16]

[16] Respondent argues (Br. 22-24) that our interpretation of Section 3(d) is not supported by the policy favoring settlements. But the statistics cited by respondent (Br. 24) show that many settlements are obtained only after issuance of a complaint. Indeed, the statistical tables cited by respondent show that between 1965 and 1983 the percentage of unfair labor practice cases disposed of by informal settlement prior to hearing rose from 22.3% to 27.2% and that this entire increase was attributable to the growth in post-complaint informal settlements. Compare 30 NLRB Ann. Rep. 188 (1965) with 48 NLRB Ann. Rep. 183 (1983). Moreover, while few charging parties thus far have sought review of their settlement objections in the courts (Br. 23-24), the number would surely increase if this Court were to hold that the NLRA afforded every charging party the right to obtain Board review of a post-complaint informal settlement, and that every such Board decision is in turn subject to judicial review. The delay and added cost resulting from such additional procedures would strongly discourage both the agency and the parties from settling cases and would thereby impede the prompt and peaceful resolution of industrial labor disputes (see Pet. Br. 29-30).

2. Respondent advances several other arguments to show that the General Counsel's informal settlement decisions are subject to judicial review.

a. Respondent contends that the General Counsel's approval of an informal settlement is reviewable in court under Section 10(f) of the Act as a "final order of the Board" because Section 3(d) provides that the General Counsel exercises her prosecutorial authority "on behalf of the Board." As we explained in our opening brief (at 23 n.12), however, the phrase "on behalf of the Board" was inserted into Section 3(d) so that the General Counsel could be housed in the same administrative agency as the Board. Section 3(d) was not designed to make every action of the General Counsel an action of the Board. If it did, every decision of the General Counsel "granting or denying * * * the relief sought" (29 U.S.C. 160(f)), including a refusal to issue a complaint, would be subject to review under Section 10(f). That result would conflict with settled law. *Vaca* v. *Sipes*, 386 U.S. 171, 182 (1967); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 138 (1975).

Respondent attempts to avoid this implication of its argument by asserting (Br. 29) that Sections 3(d) and 10(f) should be interpreted to authorize judicial review of a decision of the General Counsel only if that decision would have been reviewable prior to the creation of the Office of General Counsel in 1947. But nothing in the language of the statute or its legislative history indicates that Congress intended to base the scope of judicial review upon the state of affairs prior to 1947. The statute instead should be

interpreted according to its plain language: because a decision by the General Counsel is not a decision of the Board, it is not subject to judicial review pursuant to Section 10(f). See also Pet. Br. 22-25.[17]

Moreover, there is no reason to assume that prior to 1947 a Board-approved informal settlement would have been subject to judicial review. As we observed in our opening brief (at 22-23), the only Board prosecutorial decisions considered by the lower courts prior to the enactment of Section 3(d) were decisions not to issue complaints, and these were held to be immune from judicial review. The courts presumably would have treated other exercises of prosecutorial authority, such as a decision to withdraw a complaint in favor of an informal settlement, in the same manner.[18]

---

[17] Respondent's contention (Br. 26) that our position "would produce a regime in which form, rather than substance, would determine when judicial review is available under § 10(f)" is clearly wrong. As we have explained (see pages 11-13), the distinction between formal settlements—which incorporate binding Board orders governing the conduct of the charged party—and informal settlements—which contain no sanction other than the resumption of prosecution—is one of substance. Respondent relies (Br. 26-27) upon *International Ladies' Garment Workers Union* v. *NLRB*, 501 F.2d 823 (D.C. Cir. 1974), but the court in that case also failed to recognize the differences between formal and informal settlements (see Pet. Br. 28 n.14).

[18] Respondent's attempt (Br. 28) to support its judicial review argument by reference to the 1947 amendment of Section 10(e) and (f) of the NLRA, 29 U.S.C. 160(e) and (f), also fails. Congress amended those provisions to alter the standard of judicial review for Board findings which, under the Wagner Act, were conclusive "if supported by substantial evidence." The new provision, requiring "substantial evidence on the record as a whole," brought the NLRA into line

b. Respondent is also wrong in contending (Br. 31-33) that the General Counsel's approval of an informal settlement is subject to judicial review under the Administrative Procedure Act (APA).

First, we demonstrated in our opening brief (at 33-36) that the National Labor Relations Act "preclude[s] judicial review" under the APA of the General Counsel's action (see 5 U.S.C. 701(a)(1)). Respondent disputes our showing on the ground that the Board, rather than the General Counsel, is authorized to approve informal settlements (see Br. 30). For the reasons discussed above (at 4-6), respondent's view of the statutory scheme is incorrect.

Second, we showed in our opening brief (at 36-41) that the General Counsel's decision is not subject to judicial review under the APA for the additional reason that her decision to enter into an informal settlement is "committed to agency discretion by law" (5 U.S.C. 701(a)(1)). Respondent asserts that this provision of the APA is inapposite because respondent is not challenging the exercise of the General Counsel's discretion in withdrawing the complaint and entering into the informal settlement, but claims only that the General Counsel "overstepped the lim[i]ts of her authority in settling the case on her own, without securing the approval of the Board" (Br. 31). However, we have shown that there is no substance to respondent's claim because Board approval of informal settlements is not required.[19] If

---

with the standard of review set forth in the then recently enacted Administrative Procedure Act. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 485, 487 (1951). The amendment did not subject to review actions (like prosecutorial decisions) that were previously unreviewable.

[19] If the Act specifically required Board approval of informal settlements, and the Board improperly refused to

respondent has forsworn any challenge to the merits of the General Counsel's decision, there is no need for further consideration of the issue; if it does assert such a challenge, that claim is not subject to judicial review because the matter is "committed to [the General Counsel's] discretion by law" (5 U.S.C. 701(a)(1)).[20]

3. Respondent acknowledges that "the weight of the authority in the lower courts requires [an evi-

---

consider such a settlement, its failure to act would be reviewable pursuant to *Leedom* v. *Kyne*, 358 U.S. 184 (1958). See Pet. Br. 41 n.24.

[20] Respondent asserts (Br. 32) that the "rich body of well-developed law" that courts "draw upon" in reviewing Board approval of formal settlements is equally applicable to review of the General Counsel's decision to withdraw a complaint in favor of informal settlement. But the issue is quite different in the two contexts. In reviewing the propriety of an informal settlement agreement, a court would have to evaluate the General Counsel's decision to discontinue the prosecution of the case in favor of an informal settlement, rather than choosing to seek a formal Board order through a formal settlement or adjudication. The General Counsel's decision to proceed informally turns on the very factors that the Court in *Heckler* v. *Chaney*, 470 U.S. at 831, recognized "the agency is far better equipped than the courts to deal with." Questions regarding the relative merits of formal and informal settlements do not arise in the formal settlement context. There, the General Counsel has made a decision that a Board order is warranted; the court reviews only the propriety of the *Board's* order and has no occasion to review the *General Counsel's* decision to enter into a formal rather than an informal settlement. Accordingly, a court reviewing an informal settlement would have no law to apply where, as here, the party challenging the settlement argues that the General Counsel should not have settled the case without obtaining a formal Board order.

dentiary] hearing only where an objection raises factual issues which are contested" (Br. 34), but contends that an evidentiary hearing was warranted here because "the General Counsel's stated reason for rejecting respondent's objections * * * was that "*insufficient evidence was presented to* establish that the Regional Director abused his discretion in approving an informal settlement agreement with a non-admission clause'" (Br. 35, quoting Pet. App. 15a (emphasis added by respondent)). Respondent's effort to transform its policy-based objections into matters suitable for an evidentiary hearing is unavailing.

The record shows that respondent was afforded a full opportunity to set forth reasons and proffer evidence in support of its contention that the settlement should not have been accepted. Respondent's arguments plainly related to policy concerns, such as whether the charged parties should have been required to admit that they had violated the Act, and the General Counsel rejected these policy arguments. See Pet. Br. 8-9, 46-47; A.R. 73, 89-96, 115-119. The portion of the General Counsel's decision cited by respondent is not a finding of a material factual dispute. The General Counsel plainly concluded that, even if all of the reasons and evidence presented by respondent were accepted as true, that showing was insufficient to overcome the policy considerations favoring acceptance of an informal settlement in this case. See Pet. App. 11a (court of appeals found that respondent's objections to the settlement raised no "material disputes of fact," but rather "involve[d] merely procedural matters or discretionary determinations concerning the remedy"). As the court of appeals acknowledged (*ibid.*), an evidentiary hearing would have served no useful purpose here.

For the foregoing reasons, and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

SEPTEMBER 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181493 60041